Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

RALPH NADER, WINONA LADUKE, NADER 2000 GENERAL COMMITTEE, DAVID ELLISON, DARYL M. DAVIS, ANITA RIOS, MICHAEL LEONARDI, JULIE COYLE, GREEN PARTY OF OHIO, PAUL DUMOUCHELLE,

Petitioners,

versus

J. KENNETH BLACKWELL, Ohio Secretary of State,

Respondent.

On Petition For A Writ Of *Certiorari* To The United States Court Of Appeals For The Sixth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

DOES A STATE VIOLATE FIRST AMENDMENT FREE SPEECH AND ASSOCIATION RIGHTS AND FOURTEENTH AMENDMENT EQUAL PROTECTION GUARANTEES BY PROHIBITING PLACEMENT OF A PARTISAN BALLOT LABEL OR "CUE" ALONGSIDE THE NAME OF AN ENDORSED CANDIDATE FOR PRESIDENT, WHEN THE CANDIDATE'S PARTY DOES NOT QUALIFY AS A "POLITICAL PARTY" UNDER THE PREVAILING STATUTE?

IS IT A DENIAL OF EQUAL PROTECTION OF THE LAWS FOR A STATE TO REFUSE A PARTISAN BALLOT LABEL OR "CUE" TO THE PRESIDENTIAL NOMINEES OF MOST POLITICAL PARTIES WHEN THAT SAME STATE PERMITS A LABEL FOR DEMOCRATIC NOMINEES, REPUBLICAN NOMINEES, AND INDEPENDENT CANDIDATES?

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OPINIONS BELOW

The decision of the United States Court of Appeals for the Sixth Circuit dated January 30, 2002, is set forth in the Appendix, p. App. 1. The order denying rehearing *en banc* dated March 28, 2002, is set forth in the Appendix, p. App. 64. The opinion of the United States District Court of the Southern District of Ohio, Eastern Division, dated October 13, 2000 is set forth in the Appendix, p. App. 3.

STATEMENT OF THE BASIS OF JURISDICTION OF THE SUPREME COURT

The statutory provision for this court's jurisdiction is 28 U.S.C. §§ 1331 and 1343(3).

The United States Court of Appeals for the Sixth Circuit issued its Decision on the case on January 30, 2002, and denied a rehearing *en banc* on March 28, 2002. This petition was timely filed.

CONSTITUTIONAL, STATUTORY AND ORDINANCE PROVISIONS INVOLVED IN THIS CASE

Const. Amendment I

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Const. Amendment XIV

Section 1. All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section 2. Representatives shall be appointed among the several States according to their respective numbers, counting the whole number of persons in each excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

Section 3. No person shall be a Senator or Representative in Congress, or elector of President and Vice President, or hold any office, civil or military, under the United States, or under any State, who, having previously an oath, as a member of Congress, or an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the

Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.

Section. 4. The Validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But either the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but such debts, obligations and claims shall be held illegal and void.

Section. 5. The congress shall have power to enforce, by appropriate legislation, the provisions of this article.

Ohio Revised Code § 3505.03

On the office type ballot shall be printed the names of all candidates for election to offices, except judicial offices, who were nominated at the most recent primary election as candidates of a political party or who were nominated in accordance with section 3513.02 of the Revised Code, and the names of all candidates for election to offices who were nominating petitions, except candidates for judicial offices, for member of the state board of education, for member of a board of education, for municipal offices, and for township offices.

The face of such ballot below the stub shall be substantially in the following form:

OFFICIAL OFFICE TYPE BALLOT

(A) To vote for a candidate record your vote in the manner provided next to the name of such candidate.

(B) If you tear, soil, deface, or erroneously mark this ballot, return it to the precinct election officers or, if you cannot return it, notify the precinct election officers, and obtain another ballot.

The order in which the offices shall be listed on the ballot shall be prescribed by, and certified to each board or elections by the secretary of state; provided that for state, district, and county offices the order from top to bottom shall be as follows: governor and lieutenant governor, attorney general, auditor of state, secretary of state, treasurer of state, United States senator, representative to congress, state senator, state representative, county commissioner, county auditor, prosecuting attorney, clerk of the court of common pleas, sheriff, county recorder, county treasurer, county engineer, and coroner. The offices of governor and lieutenant governor shall be printed on the ballot in a manner that requires a voter to cast one vote jointly for the candidates who have been nominated by the same political party or petition.

The names of all candidates for an office shall be arranged in a group under the title of that office, and, except for absentee ballots or when the number of candidates for a particular office is the same as the number of candidates to be elected for that office, shall be rotated from one precinct to another. On absentee ballots the names of all candidates for an office shall be arranged in a group under the title of that office and shall be so alternated that each name shall appear, insofar as may be reasonably possible, substantially an equal number of

times at the beginning, at the end, and in each intermediate place, if any, of the group in which such name belongs, unless the number of candidates for a particular office is the same as the number of candidates to be elected for that office.

The method of printing the ballots to meet the rotation requirement of this section shall be as follows: The least common multiple of the number of names in each of the several groups of candidates shall be used and the number of charges made in the printer's forms in printing such ballots shall correspond with such multiple. The board of elections shall number all precincts in regular serial sequence. In the first precinct, the names of the candidates in each group shall be listed in alphabetical order. In each succeeding precinct, the names in each group which is listed first in the preceding precinct shall be listed last and the name of each candidate shall be moved up one place. In each precinct using paper ballots, the printed ballots shall then be assembled in tablets.

Under the name of each candidate nominated at a primary election and each candidate certified by a party committee to fill a vacancy under section 3513.31 of the Revised Code shall be printed, in less prominent type face than that in which the candidate's name is printed, the name of the political party by which the candidate was nominated or certified.

Except as provided in this section, no words, designations, or emblems descriptive of a candidate or his political affiliation, or indicative of the method by which the candidate was nominated or certified, shall be printed under or after a candidate's name which is printed on the ballot.

STATEMENT OF THE CASE

Procedural History

On September 27, 2000, Presidential candidate Ralph Nader, his running mate Winona LaDuke, and members of the Green Party of Ohio ("Petitioners") sued J. Kenneth Blackwell, Ohio's Secretary of State ("Respondent") in the Southern District of Ohio, Eastern Division, seeking a declaratory judgment that Ohio Revised Code § 3505.03 is unconstitutional as applied to them. Petitioners alleged that the State's discriminatory and uneven ballot access laws violated their associational rights and rights to equal protection under the First and Fourteenth Amendments. They sought preliminary and permanent injunctions which would order state election officials to place the word "Green" by the Nader/LaDuke presidential ticket on all ballots in Ohio.

Since suit was filed about a month and a half before the election, the district court advanced the matter on its docket. The parties filed their briefs and stipulations of fact on October 10, 2000.

On October 13, 2000, the district court issued its opinion and order, declaring that Ohio Revised Code § 3505.03, as applied to candidates of parties that do not qualify as "political parties" under Ohio Revised Code § 3517.01, violated Petitioners' First Amendment freedom of speech and association rights, and Fourteenth Amendment rights to equal protection of the laws. Following further hearing, the district court enjoined Respondent Secretary of State to use his best efforts to include the word "Green" by the Nader/LaDuke ticket on the Ohio presidential ballot.

Thereafter, the Secretary of State filed notice of appeal and moved to stay the district court's order. The order was stayed by the Sixth Circuit and Ohio was excused from making the ballot change in the year 2000 election cycle, *see Nader v. Blackwell*, 230 F.3d 835 (6th Cir. 2000) (Order).

The district court's decision was reversed following cancellation of oral argument on January 30, 2002. Petitioners' Motion for Rehearing *en banc* was denied on March 28, 2002.

The Petitioners have filed for *certiorari* to this Honorable Supreme Court based upon the issues and argument presented herein.

Statement of the Facts

On August 10, 2000, Petitioners made a written request that the ballot "cue" of "Green" be placed proximate to Nader's and LaDuke's names on the ballot. The Secretary of State never responded, but on September 7, 2000, certified their inclusion on the ballots, without either the cue of "Green" or of "independent," the latter of which is allowed by state law but had not been requested by Petitioners. During the litigation, the parties stipulated that Nader and LaDuke were the endorsed candidates of the Ohio Green Party for president and vice-president of the United States, and that while the Green Party had submitted sufficient signatures (over 13,000) to place their names on the ballot, the Party had not fulfilled the requirements of state law for recognition as a "political party" as that term is defined in Ohio Revised Code § 3517.01.

Nader/LaDuke and the Greens contended that, because the Secretary of State interpreted the statute as prohibiting Nader from placing a "cue"[1] on the ballot for the November 7, 2000 election, persons wishing to vote for the endorsed Green Party presidential ticket would be denied their First Amendment rights to free speech and association and Fourteenth Amendment rights to equal protection of the laws.

By affidavit of ballot access expert Richard Winger, Petitioners established that Ohio had allowed party "cues" on ballots since at least 1892. In that year, Ohio revised its balloting system to allow parties which had polled at least 1% of the vote in the last statewide election to automatically place their nominees on the general election ballot. Other groups were required to submit a petition signed by 1% of the vote cast. All were free to choose a partisan label, so long as it didn't mimic the name of a fully-qualified political party. In 1929 the legislature added a cumbersome petition procedure by which a group could qualify itself immediately as a full-fledged political party with the signatures of 15% of the last gubernatorial vote. No group ever used this 15% procedure, even though it existed until it was held unconstitutional in 1968. In 1947 the legislature deleted the provision of the 1% petition law which provided that candidates who used this procedure, could choose a partisan label. Instead, they could only choose the label "independent." Then, in 1951, even the use of "independent" was repealed by the legislature. That 1951 bill also raised the independent petition procedure from 1% of the last vote cast to 7%.

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[1] The word "Green" was sought to be placed by the Nader/LaDuke ticket on the Ohio ballot.

In 1968 the U.S. Supreme Court declared unconstitutional Ohio's ballot access laws on minor parties and independents. The 1969 and 1971 legislatures lowered the full-fledged party petition from 15% to 1% of the last vote cast, and lowered the independent candidate procedure (for statewide office) from 1% of the last vote cast, to 5,000 signatures. Also, the ability of presidential candidates to use the independent procedure was restored. But these legislatures did not restore the ability of candidates who use the independent procedure to choose a partisan label, not even the label "independent."

Thus, between 1892 and 1947, candidates who used the independent candidate petition procedure were free to choose a partisan label, which was printed on the general ballot next to the candidates' names. All of the minor political parties which appeared on the ballot in Ohio between 1892 and 1947 used the independent candidate procedure; none used the 1929 full party petition procedure. Since 1947, even though candidates who use the independent candidate petition procedure have not been permitted to choose a partisan label, 43 of 47 minority party candidates who appeared on the Ohio general election ballot through 1998 still used the independent candidate petition procedure. The only minor parties which placed candidates on the ballot by using the full party petition procedure are the American Party in 1976, the Libertarian Party in 1982, the Reform Party in 1996, and the Natural Law Party in 1996.

Minor parties in Ohio use the independent candidate petition procedure rather than the full-party petition procedure because the independent petition procedure has a deadline which is 4 months later than the full party petition procedure; and the number of signatures required

by the independent procedure is significantly less than the number required for full party status. The price, however, is that the current procedure does not permit choice of a partisan label and consequently, some voters who desire to vote for a particular minor party's candidate cannot if the voter does not know which candidate represents the voter's favored minor party.

Thirty-one states permit the candidate of a non-qualified party (who is seeking a place directly onto the November ballot by a petition which carries that candidate's name) to choose a partisan label which will appear on the November ballot next to the name of that candidate. In another eleven states, the number of signatures required for a fully-qualified party petition is no higher than the number of signatures for an independent candidate. Thus forty-two (42) states have avoided the "Ohio problem" – *i.e.*, the problem of minor parties having to forego a partisan label if they seek to minimize the number of signatures they have to collect.

The district court found violations of Petitioners' First Amendment rights. Noting that "[t]he identification of a candidate on a ballot as representing a political party plays a vital role in the ability of a voter to cast his or her vote effectively," the district court concluded that the absence of a "cue" was "'a prohibition of potential association with nonmembers'" which "'would clearly infringe upon the rights of the Party's members under the First Amendment to organize with like-minded citizens in support of common political goals,'" quoting *Tashjian v. Republican Party of Connecticut,* 479 U.S. 208, 215 (1986). District Court Opinion and Order, pp. 32-33, Appendix, p. App. 41.

The Sixth Circuit cancelled the scheduled oral argument of this appeal, relying on the latter of two inconsistent Sixth Circuit determinations of the constitutionality of Ohio Revised Code § 3505.03, *Schrader v. Blackwell*, 241 F.3d 783 (6th Cir.), *cert. denied*, 122 S.Ct. 200 (2001), and ignoring without overruling *Rosen v. Brown*, 970 F.2d 169 (6th Cir. 1992). Though the discrepancy was brought to the Sixth Circuit's attention by Petitioners in their "Petition for Rehearing *en banc*," the Circuit declined to reconcile the inconsistency.

REASONS FOR GRANTING THE WRIT

I. IT IS UNCONSTITUTIONAL FOR A STATE TO DENY A PARTISAN BALLOT LABEL TO THE PRESIDENTIAL NOMINEES OF MOST POLITICAL PARTIES WHEN THAT SAME STATE PERMITS A LABEL FOR DEMOCRATIC NOMINEES, REPUBLICAN NOMINEES, AND INDEPENDENT CANDIDATES.

If this Court determines that the Petitioners should be granted a Writ of Certiorari, the Court must determine the constitutionality of Ohio's legislated procedure, which denies a partisan ballot label to the nominees of most political parties. The Court should also determine an adequate remedy for Petitioners.

It is constitutionally impermissible for a State to violate freedom of speech and association in its efforts to manipulate the content of a ballot, and moreover, such efforts must not violate equal protection of the laws. The offending statute in Ohio discriminates against voters who desire to support a particular minor party, but who may

lack sufficient information to know who that party's particular candidates are. In that respect, the statute practically excludes minor party or third party candidacies from the electoral process.

In *Rosen v. Brown*, 970 F.2d 169 (6th Cir. 1992), the Sixth Circuit determined that Ohio Revised Code § 3505.03 denied a ballot label to a candidate nominated using the "independent" candidate petition process – the same process invoked by the instant Petitioners. The *Rosen* panel decided that a candidate who was not nominated by a statutorily-recognized party could not be treated differently than candidates who had been, and that the lack of a ballot "cue" deprived Rosen's supporters of the right to cast their votes meaningfully as a method of "associating" with their candidate, 970 F.2d at 175-76.

When the State of Ohio lost the *Rosen* case in 1992, it did not appeal the decision to the Supreme Court. Rather, the official response in 1995 of Ohio's General Assembly and its Governor was to re-enact the constitutionally-deficient Ohio Revised Code § 3505.03 as previously written – an obvious act of contempt for judicial authority. Candidate Schrader ran afoul of this reincarnated § 3505.03 in 1998 – and the Southern District Court of Ohio sustained Schrader's constitutionality challenges. *See Schrader v. Taft,* 78 F.Supp.2d 708 (S.D. Ohio 1999). However, the Sixth Circuit reversed Schrader's victory, and the Supreme Court declined further review. *Schrader v. Blackwell*, 241 F.3d 783 (6th Cir.), *cert. denied*, 122 S.Ct. 200 (2001).

The offending Ohio statute prevents most minor parties, most of the time, from displaying a partisan voting cue, and by extension prevents the electorate from

making an informed choice based on political philosophy. Often, several minor party candidates run for President in Ohio, each using either the "independent" cue allowed by Ohio law, or no cue at all. In a system which represses labeling of minor parties which would provide a cue to their philosophies, voters easily and in all probability vote for a party and philosophies they detest.

In Ohio, there is a greater need for labeling presidential candidates, as opposed to other candidates for office. For other offices, there is typically a single "independent" candidate in the race. But for president, there are consistently from 4 to 7 candidates who use the independent procedure. In 1984, according to the Ohio Secretary of State's Election Statistics, there were 7 presidential candidates on the ballot by petition, plus the Republican and Democratic candidates: Libertarian, Communist, Workers World, Socialist Worker, New Alliance and independent. The electorate is disserved when voters are given a list of 9 candidates (most of whom had no publicity), with no guidance as to the partisan identities of 7 of them. The Ohio presidential ballot in 2000 contained seven (7) different presidential candidates, only three of whom (Republican, Democrat, Libertarian) were party-identified.

It is "clear that adverse labels handicap candidates 'at the most crucial stage in the election process – the instant before the vote is cast.'" *Anderson v. Martin*, 375 U.S. 399, 402 (1964). Competition in ideas and government policies is at the core of our electoral process and of the First Amendment freedoms. *Williams v. Rhodes*, 393 U.S. 23, 32 (1968). This information is so important that the First Amendment "prohibit[s] government from limiting the stock of information from which members of the public

may draw." *First National Bank of Boston v. Bellotti*, 435 U.S. 765, 783 (1978).

This Court has stated that:

> The right to vote is protected in more than the initial allocation of the franchise. Equal Protection applies as well to the manner of its exercise. Having once granted the right to vote on equal terms, the State may not, by later arbitrary and disparate treatment, value one person's vote over another. Once the franchise is granted to the electorate, lines may not be drawn which are inconsistent with the Equal Protection Clause of the Fourteenth Amendment.

Bush v. Gore, 531 U.S. ___ (2000) (*per curiam)*, citing *Harper v. Virginia Bd. Of Elections*, 383 US. 663, 665 (1996). "It must be remembered that the 'right of suffrage can be denied by a debasement or dilution of the weight of a citizen's vote just as effectively as by wholly prohibiting the free exercise of the franchise." *Id.*, citing *Reynolds v. Sims*, 377 US. 533, 535 (1964).

A burden that falls unequally on new or small political parties or on independent candidates impinges, by its very nature, on associational choices protected by the First Amendment. It discriminates against those candidates and – of particular importance – against those voters whose political preferences are outside the existing political parties. *Anderson v. Celebrezze*, 460 US. 780, 793-794 (1983).

A three-judge panel of the Sixth Circuit may not reconsider, reverse, overrule, or modify the legal pronouncements of one of its prior published opinions; such a decision may be set aside or altered only by a decision of

the United States Supreme Court, or by the Sixth Circuit sitting *en banc*. *See United States v. Washington*, 127 F.3d 510, 517 & n.9 (6th Cir. 1997), *cert. denied*, 118 S.Ct. 2348 (1998); *Cross Mountain Coal, Inc. v. Ward*, 93 F.3d 211, 217 (6th Cir. 1996); *Salmi v. Secretary of Health and Human Services*, 774 F.2d 685, 689 (6th Cir. 1985). Neither of those circumstances had occurred to change the *Rosen* doctrine by the time Petitioners asked for rehearing *en banc*, hence *Schrader v. Blackwell* should not have controlled the Sixth Circuit in the instant matter.

Schrader also addresses a U.S. House of Representatives candidacy, not the ballot treatment of minor- and third-party candidacies for the office of President of the United States. The several States have less interest in, and therefore less authority to regulate, presidential candidates than candidates for other office. *Anderson v. Celebrezze*, 460 U.S. 780, 795 (1983).[2] Close scrutiny of election distinctions among the several States in presidential elections is required for Equal Protection purposes because the U.S. Constitution's Equal Protection guarantees are implicated once a State admits a particular subject to the ballot and commences to manipulate the content or to legislate what shall and shall not appear. *Rosen v. Brown*, 970 F.2d 169, 175 (6th Cir. 1992). Ohio

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[2] "Thus in a Presidential election a State's enforcement of more stringent ballot access requirements, including filing deadlines, has an impact beyond its own borders. Similarly, the State has a less important interest in regulating Presidential elections than statewide or local elections, because the outcome of the former will be largely determined by voters beyond the State's boundaries. . . . *The Ohio filing deadline challenged in this case does more than burden the associational rights of independent voters and candidates. It places a significant state-imposed restriction on a nationwide electoral process.*" (emphasis supplied)

already treats presidential independents more leniently than other independent candidates for office: the deadline for filing of petitions for independent presidential candidates in Ohio is 75 days before the general election (*i.e.*, late August), while for other offices, the deadline is primary election day (March in presidential election years, May in other years).

CONCLUSION

Ohio Revised Code § 3505.03 unconstitutionally impairs the associational rights of those voters who may wish to support a new party or a statutorily-"unqualified" party's candidate. Denial of a partisan designation for "unqualified" parties obstructs the right of political communication and the voter's meaningful exercise of his or her rights of political freedom.

In *Williams v. Rhodes*, 393 U.S. 23 (1968), this Court overturned a series of Ohio election laws that made it "virtually impossible" for candidates unaffiliated with the two established parties to successfully run for office, declaring that the legislation limited political participation of third-party candidates so dramatically that the Republicans and Democrats had a complete monopoly. The resulting burden on voting and First Amendment associational rights was held to be "an invidious discrimination in violation of the Equal Protection Clause". *Id.* at 32, 34. Before the Court in this case is a surviving remnant of that "series of Ohio election laws," which should also be struck.

The Southern District Court of Ohio properly analyzed the legal issues in this case and ruled in a just and

correct manner. The Sixth Circuit Court of Appeals ignored and reversed its own precedent, and likewise paid no heed to the Supreme Court's guidance pertinent to state-law elections. This Court must intervene to ensure free and fair ballot access in accordance with the Petitioners' First Amendment associational rights and to enforce Fourteenth Amendment Equal Protection requirements.

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No. 00-4274

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

RALPH NADER, et al.,

Plaintiffs-Appellees,

v.

J. KENNETH BLACKWELL, OHIO SECRETARY OF STATE,

Defendant-Appellant.

ORDER
(Filed
Jan. 30, 2002)

BEFORE: SUHRHEINRICH, SILER, and BATCHELDER, Circuit Judges.

Defendant-Appellant J. Kenneth Blackwell, the Ohio Secretary of State, appeals from the order of the district court permanently enjoining him from enforcing Ohio Rev. Code § 3505.03, insofar as it prohibited him from placing a political party designation on the ballot for the November 7, 2000 election to indicate that presidential candidate Ralph Nader and vice-presidential candidate Winona

LaDuke are candidates of the Green Party. The order, entered on October 13, 2000, required Blackwell to immediately take action and use his best efforts to assure, to the extent possible, that all ballots for the November 7 election complied with the court's order by having the word "Green" placed below the names of Ralph Nader and Winona LaDuke in the same manner that other political party designations appear. Blackwell previously obtained a stay pending appeal from this court. *See Nader v. Blackwell,* 230 F.3d 835 (6th Cir. 2000) (order).

During the pendency of this appeal, this Court issued its decision in *Schrader v. Blackwell,* 241 F.3d 783 (6th Cir.), *cert. denied,* 122 S.Ct. 200 (2001). *Schrader* holds that the Ohio Rev. Code § 3505.03, which denies party labels on the general election ballot to candidates of unqualified political parties, is not unconstitutional. *Schrader* controls in this case, resolving the Secretary's challenges to the district court's decision and mooting the Secretary's laches and issue preclusion arguments.

Therefore, on the basis of our decision in *Schrader, supra,* we **REVERSE** the decision of the district court. SO ORDERED.

ENTERED BY ORDER OF
THE COURT
/s/ Leonard Green
Clerk

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

RALPH NADER, et al.,	:	
Plaintiffs,	:	**Case No. C2-00-1129**
v.	:	**Judge Holschuh**
J. KENNETH BLACKWELL,	:	**Magistrate Judge Abel**
OHIO SECRETARY OF	:	
STATE,	:	
Defendant.	:	

OPINION AND ORDER

Presidential candidate Ralph Nader, his running mate Winona LaDuke, and members of the Green Party brought this action on September 27, 2000 against Defendants J. Kenneth Blackwell, Ohio's Secretary of State, and the State of Ohio[1] pursuant to 42 U.S.C. § 1983.[2] Plaintiffs seek a declaratory judgment that Ohio Revised Code § 3505.03 is unconstitutional as applied to them. Plaintiffs contend that, because the statute prohibits Ohio's Secretary of State from placing a "cue"[3] on the ballot for the

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[1] The State of Ohio was subsequently dropped as a party defendant when Plaintiffs filed an amended complaint.

[2] 42 U.S.C. § 1983 states:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress . . .

[3] A "cue" is defined as "a reminder or a prompting . . . a hint or suggestion." *The American Heritage Dictionary of the English Language* (3d ed. 1992).

November 7, 2000 election to indicate that Nader and vice-presidential candidate LaDuke are candidates of the Green Party, it violates Plaintiffs' rights to free speech and association as guaranteed by the First Amendment to the United States Constitution and Plaintiffs' equal protection rights guaranteed by the Fourteenth Amendment to the United States Constitution. In addition to the declaratory judgment, Plaintiffs also seek preliminary and permanent injunctive relief in the form of an order requiring Defendant Blackwell to place the word "Green" next to the names of Ralph Nader and Winona LaDuke on all ballots for the November 7, 2000 election.

The Court determined, and the parties agreed, that because of the proximity to election day, an expedited schedule was needed. Defendant filed an Answer on October 2, 2000. Pursuant to Fed. R. Civ. P. 65(a)(2), the Court, with the agreement of the parties, ordered that the trial of the action on the merits was to be advanced and consolidated with the hearing on Plaintiffs' motion for a preliminary injunction. The parties filed their briefs, together with a stipulation of facts, on October 6, 2000 and the Court held a hearing on October 10, 2000. On the morning of the hearing, Defendant filed an amended answer which, for the first time, raised a defense of laches, a subject which had not been mentioned in Defendant's brief.

I. Facts

The parties have stipulated to the following facts:

Plaintiffs Ralph Nader and Winona LaDuke are the endorsed candidates of the Ohio Green Party for President and Vice-President of the United States. Plaintiffs David

Ellison, Daryl Davis, Anita Rios, Michael Leonardi, Julie Coyle, and Paul DuMouchelle are residents of the State of Ohio and members of the Green Party of Ohio, and intend to vote for Nader and LaDuke in the upcoming presidential election. Defendant J. Kenneth Blackwell is Secretary of State of Ohio and, since he is the official charged under Ohio law with overseeing and administering voter and election laws, including the compilation, organization, and content of the ballot of candidates for United States president and vice-president, he is a proper defendant in this case.

The Green Party is an association of citizens with an alternative vision and philosophy from that of the two major political parties. Membership is open to all who subscribe to the Party's values of ecological wisdom, grassroots democracy, personal and social responsibility, nonviolence, decentralization, community-based economics, post-patriarchal values, respect for diversity, global responsibility and future focus.

Plaintiffs Nader and LaDuke are not members of the Green Party, but they have agreed to support the Party's platform and candidates and help build its base of support. On or about June 22, 2000, Nader and LaDuke were formally nominated by the Association of State Green Parties, of which Plaintiff Ohio Green Party is a member, as candidates for the Presidency and Vice-Presidency of the United States. The Green Party held no primary election in Ohio because it is not a recognized "political party" as that term is defined by Ohio Revised Code

§§ 3501.01 and 3517.01.[4] Instead, the Green Party petitioned for ballot access for Nader and LaDuke using the Nominating Petition and Statement of Candidacy, Form 3-V, prescribed by the Secretary of State for independent candidates.[5] However, the Green Party modified this form by indicating "Ballot line for these candidates is Green."

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[4] Ohio Revised Code § 3501.01(F) defines "political party" as "any group of voters meeting the requirements set forth in section 3517.01 of the Revised Code for the formation and existence of a political party." It further divides "political parties" into three categories – "major political party," "intermediate political party," and "minor political party" – depending on the percentage of votes received by the party of the total votes cast for the office of governor or for nominees for presidential electors.

Ohio Revised Code § 3517.01 sets forth the requirements for being a "political party." It defines a political party as "any group of voters that, at the most recent regular state election, polled for its candidate for governor in the state or nominees for presidential electors at least five percent of the entire vote cast for that office or that filed with the Secretary of State, subsequent to any election in which it received less than five percent of that vote, a petition signed by qualified electors equal in number to at least one percent of the total vote for governor or nominees for presidential electors at the most recent election . . . If any political party fails to cast five percent of the total vote cast at an election for the office of governor or president, it shall cease to be a political party."

[5] Ohio Revised Code § 3501.01(I) defines "independent candidate" as "any candidate who claims not to be affiliated with a political party, and whose name has been certified on the office-type ballot at a general or special election through the filing of a statement of candidacy and nominating petition, as prescribed in § 3513.257 of the Revised Code."

Ohio Revised Code § 3513.257 provides, *inter alia*, that persons desiring to become independent joint candidates for the offices of the president and vice-president of the United States shall file one statement of candidacy and one nominating petition for the two of them and, for candidacies to be voted on by electors throughout the entire state, the nominating petition shall be signed by no less than five thousand qualified electors.

On August 10, 2000, the Green Party presented petitions bearing 13,728 signatures to the Secretary of State. On the same date, a staff member at the Secretary of State's office was hand-delivered a letter from some of the Plaintiffs requesting that the Secretary of State place the words "Green" or "Green Party" next to Nader and LaDuke's names on the ballots for the November 7, 2000 election. The letter indicated that the request was based on the authority of *Schrader v. Taft*, 78 F. Supp. 2d 708 (S.D. Ohio 1999), and *Rosen v. Brown*, 970 F.2d 169 (6th Cir. 1992). The Secretary of State's office never responded in writing, but at all times intended to decline the request.

On September 7, 2000, Defendant Blackwell certified the official form of the November 7, 2000 Ohio general election ballot and certified the names of Nader and LaDuke for placement on that ballot as candidates for President and Vice-President of the United States. Thus, at least 5,000 registered Ohio voters were confirmed to have signed the petitions circulated for Nader and LaDuke in lawful fashion. Under current Ohio law, Nader and LaDuke are entitled to have the label or cue of "Independent" next to their names on the Ohio general election ballot; however, at the present time, there is no ballot "cue" whatsoever near their names. The parties have also stipulated that the "Affidavit of Richard Winger," attached to the stipulations as Exhibit C, is admitted for all purposes.

II. Discussion

A. Effect of *Rosen* as Binding Precedent

The first issue the Court must decide is whether the Sixth Circuit opinion in *Rosen v. Brown*, 970 F.2d 169 (6th

Cir. 1992), dictates the outcome in this case. Russell Rosen was a candidate for election to the Ohio House of Representatives. Although he was not affiliated with any political party, he gained access to the ballot by filing the required statement of candidacy along with nominating petitions containing a sufficient number of valid signatures as required by Ohio Revised Code § 3513.257.[6] He then requested that the Secretary of State, the chief elections officer, designate him as an "Independent" candidate on the ballots.

The Secretary of State refused to designate Rosen as an "Independent" candidate, citing Ohio Revised Code § 3505.03, which states in part:

> Under the name of each candidate nominated at a primary election and each candidate certified by a party committee to fill a vacancy under section 3513.31 of the Revised Code shall be printed, in less prominent type face than that in which the candidate's name is printed, the name of the political party by which the candidate was nominated or certified.
>
> Except as provided in this section, no words, designations, or emblems descriptive of a candidate or his political affiliation, or indicative of the method by which the candidate was nominated or certified, shall be printed under or after

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[6] Ohio Revised Code § 3513.257 sets forth deadlines for the filing of statements of candidacy by persons desiring to become independent candidates, together with a required number of signatures of qualified electors on nominating petitions, the number being dependent on the office being sought, in order for the candidate's name to be placed on the ballot.

> a candidate's name which is printed on the ballot.

Since Rosen had not been nominated at a primary election and was not certified to fill a vacancy, the statute prohibited the Secretary of State from listing "Independent" as a "cue" next to Rosen's name to indicate his lack of affiliation with a political party.

Rosen then filed suit under 42 U.S.C. § 1983 seeking injunctive relief against the enforcement of Ohio Revised Code § 3505.03 and a declaration that the statute was unconstitutional. The district court granted a preliminary injunction and ordered the Secretary of State to designate Rosen as an "Independent" on the ballots in the upcoming election. Rosen lost the election but, since he planned to run again in future elections, he sought a permanent injunction. *Id.* at 172.

Rosen presented affidavit testimony of three experts. Jack Noragon, a senior research consultant, stated that Ohio's election procedures have historically disadvantaged independent candidates, and that "cues" on a ballot indicating a candidate's party affiliation are crucial because party identification is the single most important influence on political opinions and voting. If the voter does not know what a candidate stands for, the voter is unlikely to cast a vote for that candidate. Jack DeSario, an assistant professor of political science, also stated that a party label is the most significant determinant of voting behavior, since many voters do not decide who to vote for until they enter the voting booth. Without a label, independent candidates are at a decided disadvantage. Finally, George Sapin, a marketing and communications professional, stated that denying independent candidates a label results

in substantial prejudice because the lack of a label gives rise to mistrust and negative inferences. The lack of a label also prejudiced Rosen, who had designed his campaign so that voters would identify his platform with the "Independent" label. *Id.* at 172-73.

The Secretary of State argued that the State of Ohio had a compelling interest in minimizing ballot-generated voter confusion and in producing a manageable ballot. The district court, however, granted Plaintiffs' motion for summary judgment and declared Ohio Revised Code § 3505.03 unconstitutional as violative of Plaintiffs' First Amendment rights to freedom of speech and freedom of association, and Fourteenth Amendment right to equal protection. Defendant appealed.

On appeal, the Sixth Circuit affirmed the district court's judgment. Finding that this case fell within the category of "capable of repetition, yet evading review," the Court found that even though the election was over, the issue was not moot since Rosen intended to run as an Independent in future elections. On the merits of the case, the Court of Appeals held that although States have the power to regulate elections, and are given discretion in determining the makeup of a ballot, they must "observe the limits established by the First Amendment." 970 F.2d at 174-75. Therefore, "[o]nce a State admits a particular subject to the ballot and commences to manipulate the content or to legislate what shall and shall not appear, it must take into account the provisions of the Federal and State Constitutions regarding freedom of speech and association, together with the provisions assuring equal protection of the laws." *Id.* at 175 (*citing Bachrach v. Secretary of Commonwealth*, 415 N.E.2d 832, 835 (Mass. 1981)).

The Sixth Circuit held that the district court erred in applying a strict scrutiny test; it should have applied the balancing test set forth by the Supreme Court in *Anderson v. Celebrezze*, 460 U.S. 780 (1983):

> [A court] must first consider the character and magnitude of the asserted injury to the rights protected by the First and Fourteenth Amendments that the plaintiff seeks to vindicate. It then must identify and evaluate the precise interests put forward by the State as justifications for the burden imposed by its rule. In passing judgment, the Court must not only determine the legitimacy and strength of each of those interests, it also must consider the extent to which those interests make it necessary to burden the plaintiff's rights. Only after weighing all these factors is the reviewing court in a position to decide whether the challenged provision is unconstitutional.

Id. at 789.

Applying the *Anderson* balancing test to Rosen's claim that Ohio Revised Code § 3505.03 was unconstitutional, the Court found that Rosen had established that the statute burdens the First and Fourteenth Amendment rights of supporters of Independent candidates. Even though Rosen's name appeared on the ballot, the lack of a "voting cue" deprived Rosen's supporters of the right to meaningfully vote and to associate with their candidate. 970 F.2d at 175-76.

The Court then reviewed the State's claimed interests in minimizing ballot-generated confusion and in producing a manageable ballot. The Court found that these claimed interests were "specious." *Id.* at 176. Restricting the flow

of information to voters by denying Rosen an "Independent" label on the ballot would seem to add to voter confusion since, without any cue at all, most voters would not have any idea what Rosen stood for. Noting that there is a "qualitative difference between an Independent candidacy and a party candidacy" that justifies differences in treatment, the Court nonetheless noted that the State may not protect the integrity of established major political parties to the effective exclusion of Independent and third party candidacies. *Id.* at 177. Furthermore, the ballot is not made any shorter by excluding a one-word designation next to Rosen's name. Particularly in light of the history of Ohio's election laws, which traditionally granted Republicans and Democrats a complete monopoly to ballot access, the Court found that § 3505.03 was "nothing more than a deliberate attempt by the State to protect and guarantee the success of the Democratic and Republican parties." *Id.* at 176-77. The Court found:

> section 3505.03 burdens the First Amendment right of individuals to associate for the advancement of political beliefs and the right of qualified voters, regardless of political affiliation, to cast their votes effectively. Moreover, the statute violates the Equal Protection Clause of the Fourteenth Amendment because it places unequal burdens on Independent and third-party candidates and is designed to give Democrats and Republicans a decided advantage at the polls in a general election.

Id. at 177-78. The Court also found that the justifications advanced by the State were highly questionable. Weighing all the factors, the Court determined that the statute was unconstitutional.

The Secretary of State in the present case contends that *Rosen* is not a binding precedent, because *Rosen* involved a candidate who desired to be identified on the ballot as an independent candidate, whereas the present case involves a candidate who desires to be identified on the ballot as a candidate of a political party. In the context of the Sixth Circuit's findings, however, it is a distinction without a constitutional difference.

The Court of Appeals expressly found that while the State has an interest in protecting the integrity of established and formally recognized major political parties, "this interest may not extend to the effective exclusion of Independent *and new party candidacies*." 970 F.2d at 177 (emphasis added). Again, "Ohio produces a ballot which gives a 'voting cue' or 'clue' to Democratic and Republican candidates but excludes such a 'voting cue' to Independent *or third-party candidates*." *Id.* (emphasis added). The Court of Appeals concluded that Ohio Revised Code § 3505.03: (1) "burdens the First Amendment right of individuals to associate for the advancement of political beliefs and the right of qualified voters, regardless of political affiliation, to cast their votes effectively;" and (2) "violates the Equal Protection Clause of the Fourteenth Amendment because it places unequal burdens on Independent *and third-party candidates* and is designed to give Democrats and Republicans a decided advantage at the polls in a general election." *Id.* at 177-78 (emphasis added). The decision of the Court of Appeals in *Rosen* thus explicitly includes "new party candidates" and "third-party candidates" within its scope.[7] This is understandable,

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[7] The State refers to the Sixth Circuit's inclusion of third party candidates as mere "dicta." (Def.'s Brief at 14). While this Court

(Continued on following page)

because, although the identifying label or "cue" is different, the same constitutional protections apply to both types of candidates.

The Secretary of State, in his effort to avoid the precedential effect of *Rosen*, refers to *Miller v. Lorain County Board of Elections*, 141 F.3d 252 (6th Cir. 1998), a subsequent decision of the Sixth Circuit, which the State contends limits the effect of *Rosen* to independent candidates, because the Court in *Miller* "was drawing a distinction between independent candidates and party candidates." Def.'s Brief at 15. The issue in *Miller*, however, was totally different from the issue in *Rosen*. In *Miller*, the issue involved Ohio's requirements for obtaining access to the ballot, Plaintiff's contention being that the requirements imposed on independent candidates were more burdensome than those imposed on party candidates. The Sixth Circuit held that Plaintiff's argument had already been answered by the Supreme Court in *Jenness v. Fortson*, 403 U.S. 431 (1970). The Court also cited to *Anderson v. Celebrezze*, 460 U.S. 780 (1982), for the proposition that a state has a right to require candidates to make a preliminary showing of substantial support in order to qualify for a place on the ballot, because "it is both wasteful and confusing to encumber the ballot with the names of frivolous candidates." *Miller*, 141 F.3d at 258.

Rosen, of course, did not involve Ohio's requirements for a candidate to obtain access to the ballot; it involved,

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disagrees with that characterization, even if so regarded, dicta of a higher court, where there is no clear precedent to the contrary, is of persuasive precedential value and should not be ignored. *Wright v. Morris*, 111 F.3d 414, 419 (6th Cir. 1997).

as does the present case, Ohio's requirements for a description of those candidates once they have qualified to be placed on the ballot. Both Rosen and Nader qualified for placement of their names on the ballot, but both were denied the advantageous identifying "cue" that was given to candidates who obtained access to the ballot by winning a primary election. There is nothing in the Sixth Circuit's decision in *Miller* that detracts from or limits the holding of that Court in *Rosen*. In fact, *Rosen* was not even mentioned, much less discussed, in *Miller*.

The State also relies on a decision by this Court in *Haffey v. Taft*, 803 F. Supp. 121 (S.D. Ohio 1992), but *Haffey* is also clearly distinguishable. In *Haffey*, the plaintiff, a candidate for the office of Chief Justice of the Ohio Supreme Court, challenged Ohio's statute which prohibited the placement of the names of *any* political party on the *nonpartisan ballot* for that office. The Court, in upholding the validity of the statute, easily distinguished the Sixth Circuit's decision in *Rosen*. "Although vaguely similar, the differences between the case *sub judice* and *Rosen* are numerous." *Id.* at 126. Among those differences was the Court's finding that, "the state in *Rosen* was unable to identify a legitimate interest in its partisan ballot requirement, whereas here the state interest is both important and legitimate." *Id.*

Finally, in its contention that *Rosen* should not be applied to this case, the State refers to a district court decision in *Green Party of Michigan v. Miller*, Case No. 99-CV-73669-DT (E.D. Mich. Sept. 14, 1999). In *Green Party*, plaintiffs, including a candidate of the Green Party for City Council of Ann Arbor, challenged Michigan's election statutes which required new political parties to obtain signatures from electors statewide and provided no

mechanism by which a local party could field a candidate for a local race. The issue was whether this amounted to an unconstitutional denial of ballot access. In upholding the validity of the Michigan statutes, the court in *Green Party* distinguished the Sixth Circuit's decision in *Rosen*. "Unlike the provision here, it was the flat prohibition [of Ohio Revised Code 3505.03] that was challenged, not the party recognition requirements." (Order Denying Plaintiffs' Motion for a Preliminary Injunction at 18). The Court expressly noted that "[t]he issue presented here is not one where Plaintiffs are precluded from having a party designation on the ballot." *Id.* at 23.

In summary, the Court finds that the decision of the Sixth Circuit Court of Appeals in *Rosen* is precedential authority that is binding on this Court and requires that Plaintiffs obtain relief from the application of the unconstitutional requirements of Ohio Revised Code § 3505.03.

B. Issue Preclusion as a Result of *Schrader*

Even if the Court were to find that *Rosen* was not binding precedent because of the distinction between independent and third party candidates, there is still the question of what preclusive effect the decision in *Schrader v. Taft*, 78 F. Supp. 2d 708 (S.D. Ohio 1999), has in this case. The Court requested that the parties brief this issue.[8]

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[8] This Court is entitled to raise the issue preclusion question *sua sponte*. *Holloway Construction Co. v. United States Dep't of Labor*, 891 F.2d 1211, 1212 (6th Cir. 1989) ("a district court may invoke the doctrine of *res judicata* in the interest of, *inter alia*, the promotion of judicial economy").

The issue in *Schrader v. Taft* was whether a candidate for the Libertarian Party was entitled to be designated as "Libertarian" on the ballot. In April of 1998, the Libertarian Party nominated James Schrader as its candidate for United States House of Representatives. He then filed nominating petitions with more than enough valid signatures to qualify him to appear on the ballot as a candidate.

After the Secretary of State refused to designate him as a "Libertarian" on the ballot, he filed suit in this Court. Initially the parties filed cross-motions for summary judgment and the Court decided in favor of Schrader. However, Defendants then contended that Plaintiffs had changed theories and asked for an opportunity to supplement the record. Magistrate Judge Merz converted his summary judgment decision to a preliminary injunction and ordered the Secretary of State to designate Schrader as a "Libertarian" on the ballot. Schrader lost the election, but the parties asked the Court to rule on supplemental cross-motions for summary judgment, because the case presented issues capable of repetition yet evading review. *Id.* at 709.

At the time Magistrate Judge Merz decided the case, the Libertarian party had allegedly gathered enough signatures to achieve status as a recognized "political party" as that term is defined in Ohio Revised Code § 3517.01. However, when Schrader was nominated, the Libertarian party was not yet "qualified" and did not hold a primary election. Accordingly, although Schrader was nominated by the Libertarian Party, he was not nominated at a primary election and therefore was not entitled to a ballot cue according to the plain language of Ohio Revised Code § 3505.03. *Id.* at 709-10.

In granting the motion for preliminary injunction, Magistrate Judge Merz relied heavily on the Sixth Circuit's opinion in *Rosen*. He found that the associational rights of the *Schrader* plaintiffs were even stronger than those of the plaintiffs in *Rosen*. While Mr. Rosen's designation as an "Independent" simply meant that he was not affiliated with the Democrats or Republicans, Mr. Schrader stood for the political principles of the Libertarian Party. Magistrate Judge Merz found that if the associational interests of the plaintiffs in *Rosen* were strong enough to override § 3503.03, the interests of Schrader and his supporters were certainly strong enough to do the same. *Id.* at 711.

The Court also found that Schrader's equal protection interests were identical to those of Mr. Rosen, since they were equally disadvantaged by the lack of a voting cue. The State of Ohio had identified no new interests beyond those advanced in *Rosen*; therefore, adding the requested designation would not make the ballot unmanageable, and the label "Libertarian" was likely to be even less confusing than the label "Independent." *Id.* at 711-12.

In his supplemental motion for summary judgment in the *Schrader* case, Ohio's Secretary of State, as in the present case, argued that the *Rosen* decision did not apply because the State had different interests in regulating independent candidates than it had in regulating third-party candidates. Defendant argued that § 3505.03 served to protect the integrity of the election process. Schrader had circulated many of his petitions, indicating that he was the Libertarian candidate, before he was officially nominated. Defendant argued that this was misleading to those who signed the petitions and that, under the Court's rationale, anyone could circulate petitions with no label at

all and later insist on a ballot designation that was contrary to the views of those who had nominated him. Magistrate Judge Merz dismissed this argument as irrelevant since it spoke not to the issue of ballot cues, but rather to the content of nominating petitions. *Id.* at 712.

Magistrate Judge Merz spoke of the right of a candidate to have a ballot "cue" and the voters' correlative right to information about what the candidate stands for. The Secretary of State already assures that candidates have a minimum amount of support by requiring a certain number of signatures to gain access to the ballot. Any concerns about confusingly similar designations, or about candidates falsely claiming to represent non-qualified political parties can be addressed by the State without completely prohibiting ballot cues for petition-nominated candidates. *Id.* Magistrate Judge Merz held, "[a]ccordingly, the Court concludes that denial of a ballot label or cue of the sort sought by Mr. Schrader to him *or to others similarly situated* denies their First and Fourteenth Amendment rights." *Id.* at 712-13 (emphasis added).

Under the doctrine of offensive collateral estoppel or issue preclusion,[9] a defendant is precluded from relitigating identical issues that the defendant previously litigated and lost against another plaintiff, and "it is beyond peradventure that the doctrine of offensive collateral estoppel or issue preclusion is firmly fixed in the firmament of federal jurisprudence." *Jack Faucett Assoc. v. Am. Telephone & Telegraph Co.*, 744 F.2d 118, 125 (D.C. Cir. 1984).

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[9] Some courts have adopted the usage of the Restatement (Second) of Judgments §§ 27-29 (1980) which divides the term "*res judicata*" into claim preclusion and issue preclusion, the term "issue preclusion" encompassing collateral estoppel.

In *Parklane Hosiery Company, Inc. v. Shore*, 439 U.S. 322 (1979), the Supreme Court approved the use of offensive collateral estoppel in federal courts, but with certain limitations.[10]

> We have concluded that the preferable approach for dealing with these problems in the federal courts is not to preclude the use of offensive collateral estoppel, but to grant trial courts broad discretion to determine when it should be applied. The general rule should be that in cases where a plaintiff could easily have joined in the earlier action or where, either for the reasons discussed above or for other reasons, the application of offensive estoppel would be unfair to a defendant, a trial judge should not allow the use of offensive collateral estoppel.

Id. at 331.

The situations pointed out by the Court where application of the doctrine would be unfair included cases in which a defendant might have little incentive to defend vigorously, particularly if future suits were not foreseeable; cases in which the judgment relied upon as a basis for the estoppel is itself inconsistent with one or more previous judgments in favor of the defendant; and cases in which the second action affords the defendant procedural opportunities unavailable in the first action that could readily cause a different result. *Id.* at 332.

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[10] In the year following *Parklane Hosiery*, the Court held that the rules of *res judicata* (or "claim preclusion") and collateral estoppel (or "issue preclusion") are generally applicable to § 1983 actions. *Allen v. McCurry*, 449 U.S. 90 (1980).

The problems associated with the use of offensive collateral estoppel that the Court referred to include a plaintiff adopting a "wait and see" attitude, in the hope that the first action by another plaintiff will result in a favorable judgment. *Id.* at 330. If it does not, the plaintiff, not being bound by that judgment, would be able to bring a second action against the same defendant on the same issue, thus increasing the amount of litigation rather than decreasing the amount of litigation, which is a basic purpose of collateral estoppel. The rule enunciated by the Supreme Court overcomes this problem by preventing a plaintiff who "could easily have joined in the earlier action" from using offensive collateral estoppel in a subsequent action against the defendant.

In the present case, it is clear that Plaintiffs are asserting the identical claim asserted by the Libertarian Party of Ohio and other plaintiffs in the *Schrader* case – that the prohibition in Ohio Revised Code § 3505.03 against words on a ballot descriptive of a candidate's political affiliation, while permitting such designation for a candidate nominated at a primary election, is a violation of Plaintiffs' freedom of association rights under the First Amendment and the candidate's equal protection rights under the Fourteenth Amendment. In each case, at the time the political party nominated its candidate, the party was not a qualified political party within the meaning of Ohio's election laws. The factual framework of both cases is sufficiently similar, the law to be applied is the same, and the claims are identical. Indeed, the complaint in the present case refers to and describes the judgment rendered by the Court in the *Schrader* case. It would appear to be an appropriate case for application of offensive

collateral estoppel, unless the limitations on the use of that doctrine prevent its application.

It is clear that none of the "fairness" factors mentioned by the Supreme Court in *Parklane Hosiery* is present in this case. The Secretary of State of Ohio obviously had the incentive to, and did, defend the *Schrader* case vigorously and could foresee future suits by similar parties if he were not successful; the *Schrader* judgment is not itself inconsistent with any previous judgments in favor of the Secretary of State; and the present action does not afford the Secretary of State any procedural opportunities that were not present in the *Schrader* case. *Parklane Hosiery*'s major limitation, the ability of the plaintiffs in the present case to "easily have joined" as parties plaintiff in the *Schrader* case, however, is not so clear. This requires an analysis of whether, under Fed. R. Civ. P. 24(a)(2), the plaintiffs in this case had the right to intervene in the *Schrader* case.[11]

The Sixth Circuit has stated that Rule 24(a)(2) provides a three-pronged test for determining a person's right to intervene in a pending action: (1) does the applicant

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[11] The Court is of the opinion that the right to intervene as a matter of right under Rule 24(a)(2) is the standard to be applied and not permissive intervention under Rule 24(b). While there may well be questions of law and fact in common, permissive intervention is within the discretion of the trial judge, and, as the Sixth Circuit has observed, "Rule 24(b) contemplates that judges may properly reach different decisions in generally similar circumstances." *Brewer v. Republic Steel Corp.*, 513 F.2d 1222, 1225 (6th Cir. 1975). The Supreme Court's limitation on the application of offensive collateral estoppel when a plaintiff "could easily have joined in the earlier action," *Parklane Hosiery*, 439 U.S. at 331, contemplates joinder as a matter of right and not joinder dependent on the exercise of discretion by a particular trial court judge.

claim an interest relating to the property or transaction that is the subject of the action?; (2) is the applicant so situated that disposition of the lawsuit may as a practical matter impair or impede his ability to protect that interest?; and (3) is the applicant's interest adequately represented by existing parties? *Purnell v. City of Akron*, 925 F.2d 941, 945 (6th Cir. 1991) (*citing Meyer Goldberg, Inc. of Lorain v. Goldberg*, 717 F.2d 290, 292 (6th Cir. 1983)).[12]

With respect to Plaintiffs' "interest" in the *Schrader* lawsuit, the Sixth Circuit has pointed out that "there is no clear definition of what constitutes a litigable 'interest' for purposes of intervention under Rule 24(a)(2)." *Id.* at 947. It could be argued that in the present case Plaintiffs had no legal interest sufficient to support intervention, because the Secretary of State had not, at the time of the *Schrader* lawsuit, denied Plaintiffs the right to have a "cue" alongside the names of the Green Party candidates. Plaintiffs having not yet suffered any injury, their interest was of an indefinite character and, arguably, they had no case or controversy at that time and no standing to bring an action against the Secretary of State. The problem with that argument, however, is that the Sixth Circuit has adopted the position that Rule 24(a)(2) does not require a specific legal or equitable interest, and a party seeking to intervene does not need to possess the standing necessary to initiate a lawsuit. *Id.* at 948.

In *Michigan State AFL-CIO v. Miller*, 103 F.3d 1240 (6th Cir.1997), the Sixth Circuit noted that "none of our

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[12] In *Michigan State AFL-CIO v. Miller*, 103 F.2d 1240 (6th Cir. 1997), the Sixth Circuit referred to four elements, the fourth being timeliness of the application to intervene, an element not involved in the present case.

cases have addressed the significance to be accorded a proposed intervenor's interest in the validity of legislation . . . " *Id.* at 1245. In *Miller*, the Court found that an entity, the Michigan Chamber of Commerce, that had been active in the political process that resulted in a state statute, had a sufficient "interest" to intervene in an action brought by labor unions against the Secretary of State to enjoin enforcement of certain provisions of the state statute. The Court noted that, "[t]his circuit has opted for a rather expansive notion of the interest sufficient to invoke intervention of right." *Id.* Given the liberality of the Sixth Circuit in determining what "interest" is sufficient to support intervention as of right, the Court is of the opinion that Plaintiffs in the present case had sufficient interest in protecting their constitutional rights by challenging the validity of Ohio's statute to meet the first prong of the intervention test.

With respect to the second prong, a showing that disposition of the *Schrader* case may impair Plaintiffs' ability to protect their interest, the answer is obvious. An adverse decision by the court in the *Schrader* case would clearly impair Plaintiffs' ability to assert their constitutional rights in challenging the validity of Ohio's statute. In *Miller*, the Sixth Circuit stated that, "[t]his court has already acknowledged that potential *stare decisis* effects can be a sufficient basis for finding an impairment of interest." *Id.* at 1247 (*citing Linton v. Comm'r of Health and Env't*, 973 F.2d 1311, 1319 (6th Cir. 1992)).

Finally, with respect to the third prong, whether the applicant's interest is not adequately represented by existing parties, the Sixth Circuit has held that "[o]ne is not required to show that the representation will in fact be inadequate" and, for example, "it may be enough to show

that the existing party who purports to seek the same outcome will not make all of the prospective intervenor's arguments." *Id.* While the burden to show inadequate representation may be "minimal," *id.*, it nevertheless is a specific requirement of Rule 24(a)(2), and it is here that Plaintiffs' right to intervene in the *Schrader* case is seriously questioned. The *Schrader* plaintiffs were certainly capable – and, indeed, were successful – in asserting all of the arguments Plaintiffs in the present case have made in challenging the validity of Ohio Revised Code § 3505.03. There is absolutely no indication that the plaintiffs in the *Schrader* case were, in the slightest degree, incapable or disinclined to fully and adequately present all of Plaintiffs' arguments regarding constitutionality of the Ohio statute and to do so effectively. There is nothing so different or unique in the Plaintiffs' claims regarding the Green Party as to distinguish them from the claims regarding the Libertarian Party in order to base a claim on inadequate representation in the *Schrader* case.

In *Bradley v. Milliken*, 828 F.2d 1186 (6th Cir. 1987), the Sixth Circuit described the "burden of demonstrating inadequate representation" as follows:

> However, even assuming that the proposed intervenors have stated a sufficient interest in this litigation which is likely to be impaired – *i.e.*, an interest in preserving particular remedial components – they must also establish that the present class representatives will not adequately protect that interest. *See Meyer Goldberg, Inc. v. Goldberg*, 717 F.2d 290, 293 (6th Cir.1983) ("the applicant for intervention bears the burden of demonstrating inadequate representation"). This requires "overcom[ing] the presumption of adequacy of representation that arises when the

> proposed intervenor and a party to the suit ... have the same ultimate objective." *Wade v. Goldschmidt*, 673 F.2d 182, 186 n.7 (7th Cir. 1982) (*per curiam*). An applicant for intervention fails to meet his burden of demonstrating inadequate representation "when no collusion is shown between the representatives and an opposing party, when the representative does not have or represent an interest adverse to the proposed intervenor, and when the representative has not failed in its fulfillment of his duty." *Id.*; *see also Liddell v. Caldwell*, 546 F.2d at 770; *Morgan v. McDonough*, 726 F.2d at 14.

Id. at 1192.

In the present case it is obvious that the Green Party plaintiffs have exactly the same ultimate objective as did the Libertarian plaintiffs in the *Schrader* case, *i.e.*, to obtain an injunction requiring the Ohio Secretary of State to place a "cue" alongside the names of their respective candidates on the ballot. This creates the presumption of adequacy of representation, and nothing has been shown that would overcome that presumption. There was obviously no collusion between the *Schrader* plaintiffs and Ohio's Secretary of State; the *Schrader* plaintiffs clearly did not represent any interest adverse to Plaintiffs in the present case; and the *Schrader* plaintiffs did not fail in vigorously pursuing their claims.

Consequently, the Court concludes that if Plaintiffs had sought intervention as of right in the *Schrader* case, Plaintiffs would not have been able to satisfy all of the requirements of Rule 24(a)(2) and, specifically, the requirement of showing inadequate representation by the Libertarian plaintiffs. Therefore, Plaintiffs could not "easily have joined" in the *Schrader* case, and as a result,

the *Parklane Hosiery* limitation on application of offensive collateral estoppel in this respect does not apply in this case.

In his brief, the Secretary of State correctly sets forth the requirements for the application of the doctrine of collateral estoppel as follows:

(1) the issue in the subsequent litigation is identical to that resolved in the earlier litigation;

(2) the issue was actually litigated and decided in the prior action;

(3) the resolution of the issue was necessary and essential to a judgment on the merits in the prior litigation;

(4) the party to be estopped was a party to the prior litigation (or in privity with such a party); and

(5) the party to be estopped had a full and fair opportunity to litigate the issue.

Def.'s Brief at 6 (*citing Hammer v. Immigration and Naturalization Serv.*, 195 F.3d 836, 840 (6th Cir. 1999).

The State does not deny that the legal issue in the present case and in the *Schrader* case is identical; that the resolution of this issue was necessary and essential to the judgment rendered in the *Schrader* case; that the party to be estopped, the Ohio Secretary of State, was a party to the *Schrader* litigation; and that the Secretary of State had a full and fair opportunity to litigate the issue. It is only the second requirement that the State seriously contends is not present. "The operative prong of this test, for the present action, is number two: the issue was actually litigated and decided in the prior action." Def.'s Brief at 6. The basis for this contention is the fact that

Judge Merz granted the Secretary of State's motion for a stay of the judgment pending appeal to the Sixth Circuit Court of Appeals.

However, in federal courts, neither an appeal nor a stay of a decision pending the outcome of an appeal affects the doctrine of issue preclusion.

> A final judgment in federal court can be the basis for claim preclusion despite the fact that an appeal is pending, or that the judgment may be subject to appeal in the future. Finality for this purpose is not affected by the fact that the appeal is taken with a stay or supersedes; these suspend execution of the judgment, but not its conclusiveness in other proceedings.

18 James W. Moore, *Moore's Federal Practice*, § 131.30 [2][c][ii] (3d ed. 2000). *See also Huron Holding Corp. v. Lincoln Mine Operating Co.*, 312 U.S. 183, 184 (1941) ("while an appeal with proper supersedeas stays execution of the judgment, it does not – until and unless reversed – detract from its decisiveness and finality"); *Securities and Exchange Comm'n v. O'Hagan*, 901 F. Supp. 1461, 1466 (D. Minn. 1995) (holding that pendency of appeal, despite stay of judgment, does not suspend preclusive effect of judgment); *Erebia v. Chrysler Plastic Products Corp.*, 891 F.2d 1212, 1215 n.1 (6th Cir.1989) ("the established rule in the federal courts is that a final judgment retains all of its preclusive effect pending appeal").

Likewise, *Restatement (Second) of Judgments* § 13, cmt. f (1980) states that finality of a judgment for purposes of *res judicata* is not affected by the fact that the appellant has obtained a stay pending appeal. Further, even if Magistrate Judge Merz stayed the case because he

thought the Sixth Circuit may have reason to reverse his decision, this is irrelevant. "The test of finality . . . is whether the conclusion in question is procedurally definite and not whether the court might have had doubts in reaching the decision." *Id.*

While not denying that the legal issue involved in both cases is identical, the State says that "[i]t is a debatable issue" as to whether the first prong of the issue preclusion test is met, because in *Schrader* the Libertarian candidate was a member of the Libertarian Party, whereas in the present case neither Nader nor his running mate are members of the Green Party. This difference in the evidence is of no significance with respect to the legal issue involved in both cases. In both cases the candidates were the chosen nominees of minor political parties who, by virtue of the prohibition contained in Ohio Revised Code § 3505.03, could not have an identifying "cue" concerning that fact on the ballot. The constitutional issues involving the rights of the voters and the candidates under the First and Fourteenth Amendments are the same. As noted elsewhere in this opinion,[13] the State would have no right to interfere with the associational guarantees of the First Amendment by compelling membership in a particular party before that party could nominate a candidate who does, in fact, agree to be the candidate of that party and be so identified with the party on the ballot. The State's arguments against application of the doctrine of collateral estoppel are, in the view of this Court, meritless.

The Court is aware, however, that there is an exception to the right to use offensive collateral estoppel when

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[13] *Infra*, p. 31-32.

the defendant is a federal governmental entity, and that there is a division in authority concerning whether this exception also applies to governmental entities of a state. In the present case, the Secretary of State did not raise this question in his brief, and at the hearing indicated that the fact that a state official was the defendant in both the *Schrader* case and the instant case did not affect the application of this doctrine.[14] The Court, therefore, need not resolve this question, but in view of the fact that the Court raised the question of collateral estoppel *sua sponte,* and in the interest of a full discussion of the doctrine, it deserves some further mention.

Even if it were an issue in this case, which it is not, the Court would find that the fact that the defendant is a state official would not prevent the application of the doctrine of collateral estoppel for the reasons hereafter set forth.

While *Parklane Hosiery* clearly allowed trial courts broad discretion in applying offensive and defensive collateral estoppel against private parties as a matter of

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[14] The following colloquy took place at the hearing:

> THE COURT: As I understand from your briefs, the only reason that you feel that the doctrine of collateral estoppel is not applicable as far as the *Schrader* decision is concerned is because of that stay and the fact that it is on appeal?
>
> MR. MARZIALE: Yes, Your Honor.

Transcript of Hearing at 58.

When asked specifically whether the fact that the Secretary of State was a party in the *Schrader* case would prevent application of the doctrine of collateral estoppel, the response of counsel for the Secretary of State was "Not that fact alone, Your Honor." Transcript of Hearing at 66.

federal law, the Supreme Court, in *United States v. Mendoza*, 464 U.S. 154 (1984), held that "nonmutual offensive collateral estoppel is not to be extended to the United States." *Id.* at 158. The Court pointed out that the application of this doctrine to the federal government would deprive the Supreme Court of the benefit it receives from the circuit courts of appeal exploring a difficult question before the Court grants *certiorari* and would force the government to appeal every adverse decision for fear of foreclosing further review, rather than applying a standard of review based upon consideration of the government's resources and crowded dockets of the courts.[15]

Although *Mendoza* dealt with the application of offensive collateral estoppel in cases in which the federal government agencies or officers are defendants, the question remains unresolved as to whether *Mendoza's* holding also applies to actions in which state government agencies or officers are defendants. The Supreme Court has not decided this issue, and the lower courts are not in agreement. For example, in *Hercules Carriers, Inc. v. Claimant State of Florida, Department of Transportation*, 768 F.2d 1558 (11th Cir. 1985), the court held that, "the rationale outlined by the Supreme Court in *Mendoza* for not applying a nonmutual collateral estoppel against the government is equally applicable to state governments." *Id.* at 1579. However, in *State of Alaska v. United Cook Inlet Drift Association*, 895 P.2d 947 (Alaska 1995), the court "decline(d) to adopt the *Mendoza* exception which

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[15] Following *Mendoza*, the Sixth Circuit, in a tax case, held that offensive collateral estoppel "is not permitted against the United States." *Kennedy v. Commissioner of Internal Revenue*, 876 F.2d 1251, 1257 (6th Cir. 1989).

would preclude in all cases, the offensive use of collateral estoppel against the State," holding that, "[t]he exception to this doctrine which the *Mendoza* court created was one especially fashioned for the federal government as a litigant." *Id.* at 951. And in *Benjamin v. Coughlin*, 708 F. Supp. 570 (S.D.N.Y. 1989), noting that the "decision to apply offensive collateral estoppel must be made with discretion," the court applied it against a state agency, pointing out that *Hercules Carriers* involved separate state agencies, whereas *Benjamin* involved the same state agency:

> Here, the same state agency, DOCS, litigated and lost the issue in state courts. The agency had a full and fair opportunity to litigate, and the identical issue was actually litigated and actually decided. The agency was aware that this action was pending at the time the state actions were decided, and so had a strong incentive to appeal the adverse decisions. Therefore, it is not unfair to prevent defendants from religitating the issue in this case.

Id. at 573.

The Sixth Circuit has not ruled on the question of whether *Mendoza* applies to state governmental agencies as well as federal governmental agencies. In a footnote in *Chambers v. Ohio Department of Human Services*, 145 F.3d 793 (6th Cir. 1998), the court discussed the issue of offensive collateral estoppel against a state agency in response to plaintiffs' argument that it should be applied in that case, because two prior judgments of Ohio appellate courts had ruled against the Ohio Department of Human Services on the issue involved in the federal action. *Id.* at 801 n.14. Because the judgments were state court judgments, the Court of Appeals looked to the law of

the rendering state to determine whether and to what extent the prior judgments should receive preclusive effect in a federal action. *Id.* (*citing Hapgood v. City of Warren*, 127 F.3d 490, 493 (6th Cir. 1997), *cert. denied*, 523 U.S. 1046 (1998)).[16] It found that, in Ohio, mutuality of parties is a prerequisite to the offensive use of issue preclusion and, because there was no mutuality of parties, the Ohio judgments could not be used in that case to preclude defendant from litigating the same issue in the federal court.

The Court of Appeals could have ended its footnote on this basis, but it added a reference to the *Mendoza* exception. "Although the *Mendoza* rationale has not been definitively extended to apply to state governments, there is support for that proposition." 145 F.3d at 801 n.14 (*citing Hercules Carriers, Inc. v. Florida*, 768 F.2d 1558, 1579 (11th Cir. 1985) and *Milton S. Kronheim & Co. v. District of Columbia*, 91 F.3d 193, 205 (D.C. Cir. 1996), *cert. denied*, 520 U.S. 1186).[17] The Court of Appeals added

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[16] The Sixth Circuit, although noting that there is a view that the application of collateral estoppel concerns the decisional process in federal courts and could be resolved by federal law, has nevertheless followed *Migra v. Warren City School District Board of Education*, 465 U.S. 75 (1984), requiring a federal court to adopt the same doctrine of collateral estoppel as the state in which the earlier judgment was rendered. *McAdoo v. Dallas Corporation*, 932 F.2d 522, 524 (6th Cir. 1991).

[17] The citation to the *Kronheim* case was to a concurring opinion in which it was noted that the *Mendoza* decision may apply to the states, referring to the *Hercules Carrier* case, but noting also the contrary conclusion in the *Alaska* case. It was not necessary to decide this question because the opinion relied on "was not designed to and did not have preclusive effect." 91 F.3d at 205.

that, "[t]he same considerations set forth in *Mendoza* with respect to the federal government *may* apply to state governments." 145 F.3d at 801 n.14 (emphasis added). The conclusion reached by the Court of Appeals was that, "[w]hile Ohio law is silent in this respect, given its restrictive views on mutuality, we anticipate that the Ohio Supreme Court would not use offensive non-mutual issue preclusion against the state." *Id.*

In this Court's view, the language of the Court of Appeals in the *Chambers* footnote is not a decision of the appellate court which forecloses a consideration by this Court of the question referred to in that footnote. Apart from its use of the word "may," the critical point is that the Court of Appeals was predicting what effect the Ohio Supreme Court would give to the state court judgments. In the present case, no such question is presented. The question here is what effect a federal court should give to a prior federal court judgment. Contrary to the Ohio rule on mutuality of parties, there is no such requirement under federal law. *Blonder-Tongue Laboratories, Inc. v. University of Illinois Foundation*, 402 U.S. 313 (1971). The Court turns then to a consideration of whether the *Mendoza* exception to the doctrine of offensive collateral estoppel regarding federal government agencies should be applied against the Ohio Secretary of State in this case with respect to this Court's previous judgment in *Schrader*.

It has been argued that the *Mendoza* exception should not be categorically applied in cases involving agencies and officers of a state government:

> As fairness to the defendant is the test for the application of any nonmutual preclusion, fairness – both in policing institutional arrangements and in providing justice in the individual case – must

> be the touchstone for the analysis of nonmutual issue preclusion against state governments. As the decisions of the Second Circuit and the Alaska Supreme Court demonstrate, courts will achieve such fairness only through the reasoned elaboration of rules and the abandonment of reflexive extensions to sovereigns of immunity from preclusion. As *Mendoza* suggests, the need to protect courts with discretionary jurisdiction to foster active development of the law, and to maintain executive discretion supports a strong presumption that state governments should be immune from nonmutual preclusion. Yet the weight of the cases reviewed also suggests that courts should, and often have, avoided unreflective extension of *Mendoza's* rationale in favor of a multifactored analysis of whether the specific circumstances of a particular case require overriding the presumption. Such an analysis allows consideration of such factors as the effects of nonmutual preclusion on the development of the law, judicial federalism, the executive's status and discretion, practical issues of executive coordination, the economics of nonmutual preclusion, the administration of justice, and the power of the judiciary.

Note, *Nonmutual Issue Preclusion Against States*, 109 Harv. L. Rev. 792, 808-09 (1996) (internal citations omitted).

This Court believes that there is nothing in the *Mendoza* opinion that requires a federal court to categorically refuse to apply the doctrine of offensive collateral estoppel in actions brought against a state official. In *Mendoza*, the Supreme Court summarized its conclusion as follows: "nonmutual offensive collateral estoppel simply

does not apply against the government in such a way as to preclude relitigation of *issues such as those involved in this case.*" 464 U.S. at 162 (emphasis added). While it may be debated as to the limiting effect of this language, there can be little debate on the proposition that the policy concerns on which *Mendoza* is based are not necessarily present in all actions involving an official of state government. The present case illustrates that point.

First, the *Mendoza* Court referred to the benefit to the Supreme Court from permitting the various circuit courts of appeal to explore a difficult question before the Supreme Court grants *certiorari*. The present case involves a district court applying offensive collateral estoppel with respect to a prior judgment rendered *by the same district court*. The prior judgment, involving the same issues as in the present case, is presently on appeal to the Sixth Circuit Court of Appeals. The appellate court will decide *Schrader* on the merits, unrestrained by the doctrine of offensive collateral estoppel.

Second, the *Mendoza* court referred to the need for the Solicitor General to consider a variety of factors in determining when to appeal an adverse decision and was concerned that the Solicitor General would feel compelled to appeal every adverse decision. Unlike the Solicitor General, the Ohio Attorney General litigates in a single jurisdiction and is faced with a much smaller volume of litigation. As the Court in the *Alaska* case noted, "[c]onsequently, the need to authorize appeals of only the strongest cases is not as compelling as it is in the diverse federal system." 895 P. 2d at 952.

Finally, the *Mendoza* court referred to the possibility of successive administrations of the Executive Branch

taking differing positions with respect to the resolution of a particular case, pointing out that one administration, for policy matters, may decide not to appeal, while a succeeding administration may have a different policy. In the present case, the *Schrader* judgment was against Bob Taft, Secretary of State under the administration of Governor George Voinovich. It has been appealed by Taft's successor, J. Kenneth Blackwell, Secretary of State. Since Bob Taft is now Governor of the State of Ohio, any concerns about succeeding administrations taking differing positions with respect to a resolution of the *Schrader* judgment are simply non-existent in this case.

This case involves the question of whether the doctrine of offensive collateral estoppel should be applied to prevent the defendant, the Secretary of State of Ohio, from relitigating the same issue which he vigorously argued and lost in a case decided by another judge of this same court. There are no compelling policy concerns to prevent the application of that doctrine under these circumstances. As the Supreme Court noted in *Mendoza*, "[c]ollateral estoppel, like the related doctrine of *res judicata*, serves to 'relieve parties of the cost and vexation of multiple lawsuits, conserve judicial resources, and, by preventing inconsistent decisions, encourage reliance on adjudication.'" 464 U.S. at 158 (*quoting Allen v. McCurry*, 449 U.S. 90, 94 (1980)).

The very nature of the doctrine of offensive collateral estoppel, with its important component of fairness to the defendant, does not lend itself to rigid rules. Instead, as noted by the Supreme Court and by the Sixth Circuit, broad discretion is vested in district courts in applying the doctrine. As the Sixth Circuit said in *Clay v. Johns-Manville Sales Corporation*, 722 F.2d 1289, 1295 (6th Cir.

1983), "We . . . recognize the broad discretion that the Supreme Court has vested in the District Judge in determining whether or not to make use of this doctrine." This Court concludes, in the exercise of its discretion, that the doctrine of offensive collateral estoppel, under the particular circumstances of this case, should be applied to prevent Defendant Secretary of State from relitigating the same issues decided by this Court in *Schrader*.

C. Merits of Plaintiffs' Claims

Even if the Court did not find that it was bound by the Sixth Circuit's decision in *Rosen* because of the alleged distinctions between independent and third-party candidates, and even if it did not find that *Schrader* had a preclusive effect on this litigation, the Court would still find that Plaintiffs are entitled to the relief sought.

It must be noted at the outset that the issue in this case does not involve the validity of Ohio's statutes that govern access to a place on the ballot. "The State has the undoubted right to require candidates to make a preliminary showing of substantial support in order to qualify for a place on the ballot, because it is both wasteful and confusing to encumber the ballot with the names of frivolous candidates." *Anderson v. Celebrezze*, 460 U.S. 780, 788 n.9 (1993). Mr. Nader, the candidate nominated by the Green Party, obtained the number of signatures required by Ohio law for him to be placed on the ballot for the November election. He cannot, therefore, be considered a "frivolous candidate." The issue involved in this case, in contrast, concerns "the right of qualified voters, regardless of their political persuasion, to cast their votes effectively," a right which ranks "among our most precious freedoms."

Williams v. Rhodes, 393 U.S. 23, 30 (1968), and the right of Mr. Nader as the candidate of the Green Party to be treated on the ballot the same as other qualified candidates, under the Equal Protection Clause of the Fourteenth Amendment.

The parties agree that constitutional challenges to specific provisions of a State's election laws cannot be resolved by any "litmus paper test" that separates valid from invalid restrictions, and that the Court must consider the constitutional validity of Ohio Revised Code § 3505.03 under the analysis described in *Anderson*:

> [A] court must resolve such a challenge by an analytical process that parallels its work in ordinary litigation. It must first consider the character and magnitude of the asserted injury to the rights protected by the First and Fourteenth Amendments that the plaintiff seeks to vindicate. It then must identify and evaluate the precise interests put forward by the State as justifications for the burden imposed by its rule. In passing judgment, the Court must not only determine the legitimacy and strength of each of those interests; it also must consider the extent to which those interests make it necessary to burden the plaintiff's rights. Only after weighing all these factors is the reviewing court in a position to decide whether the challenged provision is unconstitutional.

460 U.S. at 789.

With respect to the "character and magnitude of the asserted injury to the rights protected by the First and Fourteenth Amendments" that Plaintiffs seek to vindicate, the right to cast votes effectively is "among our most

precious freedoms." In *Rosen*, the Sixth Circuit, while recognizing that it was not the usual ballot access case, accepted Rosen's argument that while his name did in fact appear on the ballot, the State essentially rendered this nugatory by providing a "voting cue" to his major party opponents at the crucial moment in the election campaign, but denying him the same identifying "voting cue." The Court then pointed out that, "[t]he primary concern in any ballot access case is not the interests of the candidate but of the voters who support the candidate and the views espoused by the candidate." 970 F.2d at 175. It concluded that, "[t]he voter interests at stake are basic associational rights secured against state action by the First and Fourteenth Amendments, and any restriction on ballot access by candidates necessarily burdens the rights of their supporters to some extent." *Id.* at 175-76.

The identification of a candidate on a ballot as representing a political party plays a vital role in the ability of a voter to cast his or her vote effectively. As the Supreme Court noted in *Tashjian v. Republican Party of Connecticut*, 479 U.S. 208, 220 (1986), "[t]o the extent that party labels provide a shorthand designation of the views of party candidates on matters of public concern, the identification of candidates with particular parties plays a role in the process by which voters inform themselves for the exercise of the franchise."

The Supreme Court has also observed that a more careful scrutiny of First Amendment rights is warranted in cases, as the present case, that involve minor political parties such as the Green Party. "[B]ecause the interests of minor parties and independent candidates are not well represented in state legislatures, the risk that the First Amendment rights of those groups will be ignored in

legislative decisionmaking may warrant more careful judicial scrutiny." *Anderson*, 460 U.S. at 793 n.16. Applying the "more careful judicial scrutiny" to the facts of this case, it is apparent – as the Sixth Circuit noted in *Rosen* – that the First and Fourteenth Amendment rights of not only independent candidates but also third party candidates are burdened by a state statute that permits the candidates of major political parties to have a party label alongside the candidates' names on the ballot but denies the candidates of minor political parties that same privilege.[18]

The fact that Ralph Nader is not a member of the Green Party is of no consequence. The members of the Green Party who nominated him to be their candidate for President had the right to select him for this position and he had the right to associate with them and to be identified with that party on the ballot. If a state attempted to provide that "only Party members might be selected as the Party's chosen nominees for public office, such a prohibition of potential association with nonmembers would clearly infringe upon the rights of the Party's members under the First Amendment to organize with like-minded citizens in support of common political goals." *Tashjian*, 479 U.S. at 215.

It being apparent that Ohio Revised Code § 3505.03 does indeed burden the First and Fourteenth Amendment rights of the Plaintiffs, it remains for the Court to "identify and evaluate the precise interests put forward by the

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[18] The Court's reference in this opinion to "minor political parties" refers to small political parties that are, in fact, political parties but which may not meet the definition of a "minor political party" contained in Ohio Revised Code § 3501.01(F)(3).

State as justifications for the burden imposed by its rule." *Anderson*, 460 U.S. at 789. State election laws that impose severe burdens on plaintiffs' constitutional rights must be "narrowly tailored and advance a compelling state interest. Lesser burdens, however, trigger less exacting review, and a State's 'important regulatory interests' will usually be enough to justify 'reasonable, nondiscriminatory restrictions.'" *Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 358 (1997) (*quoting Burdick v. Takushi*, 504 U.S. 428, 434 (1992)). Under this standard, "no bright line separates permissible election-related regulation from unconstitutional infringements on First Amendment freedoms." *Id.* at 359.

The State contends that Ohio Revised Code § 3505.03 is "part of a reasonable and rational regulatory scheme designed to promote fair, honest elections." (Def.'s Brief at 17). If the challenged statute indeed had those effects, there could hardly be any doubt that it would survive constitutional muster. "[A]s a practical matter, there must be a substantial regulation of elections if they are to be fair and honest and if some sort of order, rather than chaos, is to accompany the democratic processes." *Burdick*, 504 U.S. at 433 (*quoting Storer v. Brown*, 415 U.S. 724, 730 (1974)).

In support of its argument that Ohio's election regulations support these purposes, particularly "political stability," the State points to its statute, Ohio Revised Code § 3517.01, which defines a "political party" and imposes requirements – which the Green Party has not met – for a political party to be considered a "political party" within the meaning of Title 35 of the Ohio Revised Code. The State does not deny that the Green Party is, in fact, a political party, albeit a minor one, but contends that its

ability to regulate qualified political parties would be negated if a candidate of a minor party is permitted to have a symbol of that party alongside his or her name on the ballot. Stated differently, requiring the placement on the ballot of a symbol indicating the name of the minor party that nominated the candidate would somehow negate Ohio's requirements for a political party to be recognized as a "political party."

Ohio divides political parties into "major" political parties, "intermediate" political parties, and "minor" political parties, depending on the percentage of the votes received by their candidates for governor or nominees for presidential electors at the most recent regular state election. To qualify even as a "minor" political party, the party needs to receive not less than five percent of the vote or, failing that, must file petitions signed by qualified electors equal to at least one percent of the vote. Ohio Revised Code § 3517.01. No other political parties are recognized. Not only does Ohio discriminate among these groups (*e.g.*, Ohio Revised Code § 3517.17 permits only "major" political parties to receive public money from the Ohio political party fund), but more pertinent to the present case, it discriminates against candidates of political parties that do not meet Ohio's statutory definition of what Ohio has chosen to recognize as a "political party" after that candidate's name has been placed on the ballot.

The question in this case, therefore, is whether Ohio's discrimination against candidates in the manner in which they appear on the ballot can withstand constitutional scrutiny. Treating candidates differently in order to obtain access to the ballot, *e.g.*, restrictions to assure the State that a candidate is bona fide and has a required level of support, is not the same as treating candidates differently

with respect to the manner in which they are described on the ballot. Even if the burden on Plaintiffs' rights is not as severe as in cases involving an outright denial to ballot access, in which it may be necessary to show a compelling state interest, the burden on Plaintiffs' rights must still be measured by the *Anderson* balancing test. As the Sixth Circuit held:

> Once a State admits a particular subject to the ballot and commences to manipulate the content or to legislate what shall and shall not appear, it must take into account the provisions of the Federal and State constitutions regarding freedom of speech and association, together with the provisions assuring equal protection of the laws.

Rosen, 970 F.2d at 175.

In short, while a state may constitutionally treat candidates for public office differently for one purpose, this does not mean that it can constitutionally treat candidates differently for *all* purposes. The tests to be applied may be different, depending on the nature of the restriction, but the constitutional rights remain the same.

Defendant relies primarily on *Timmons v. Twin Cities Area New Party*, 520 U.S. 351 (1997), in which the Supreme Court upheld the validity of a Minnesota statute that prohibited an individual from appearing on the ballot as a candidate of more than one party. *Timmons*, however, is clearly distinguishable from the present case. First, as the Supreme Court noted, the prohibition against a candidate using a party name on the ballot if the candidate had already been nominated by another party "applies to major and minor parties alike." *Id.* at 360. Second, the Court accepted the argument that a major political

party could arrange for members of the party to nominate the party's chosen candidate under newly formed "parties" using popular slogans and catchwords, transforming the ballot into a "billboard for political advertising." *Id.* at 352. Also, by permitting a minor party to use the name of a major party's candidate might enable the minor party to "bootstrap" its way to major party status in the next election and circumvent the State's nominating-petition requirement for minor parties. *Id.* While such concerns may exist in a situation where a party seeks to place on the ballot the name of a candidate already nominated by another political party, they are not present in the case now before this Court.

The Supreme Court in *Timmons* also recognized a State's interest in the stability of their political systems and the perceived benefits of a stable two-party system, in enacting reasonable election regulations that "temper the destabilizing effects of party-splintering and excessive factionalism," even if the effect may favor the traditional two-party system. *Id.* at 367. It is difficult, however, to see how Ohio's statute does anything to promote a "stable" two-party system. It has nothing to do with any perceived destabilizing effect resulting from using a major political party's candidate as the same candidate of a minor political party. It simply outright prohibits *any* political party's name from appearing alongside a candidate's name on the ballot unless that candidate was nominated in a primary election. While it patently favors candidates of the two dominant political parties, its purpose in doing so is not grounded on any legitimate concern for stability of the two party system. Permitting a symbol of a minor political party alongside a legitimate candidate of that party hardly has a destabilizing effect on the two party system. As the

Sixth Circuit said in *Rosen*, Ohio's statute "is designed to give Democrats and Republicans a decided advantage at the polls in a general election," and by placing unequal burdens on both independent and third party candidates is in violation of the Equal Protection Clause of the Fourteenth Amendment. 970 F.2d at 177-78.

The State also relies on *Miller v. Lorain County Board of Elections*, 141 F.3d 252 (6th Cir. 1998), for the proposition that our Court of Appeals "has acknowledged the interests previously asserted by Ohio for having such a comprehensive regulatory scheme." (Def.'s Brief at 12). The litany of interests contained in the State's quotation is simply a repeated quotation of the State's argument in *Miller*. *Miller* involved a claim by an independent candidate for Congress that Ohio's statutory scheme for placing an independent candidate's name on the general election ballot was unconstitutional. The Sixth Circuit noted that a similar statutory scheme had been upheld by the Supreme Court in *Jenness v. Fortson*, 403 U.S. 431 (1971), but proceeded nonetheless to analyze Miller's claims under the *Anderson* criteria. The Sixth Circuit held that a state law requirement that a candidate make a preliminary showing of support is legitimate, quoting the *Anderson* case: "The state has the undoubted right to require candidates to make a preliminary showing of substantial support in order to qualify for a place on the ballot, because its [sic] is both wasteful and confusing to encumber the ballot with the names of frivolous candidates." 141 F.3d at 258 (*quoting Anderson*, 460 U.S. at 788 n.9). The present case, of course, does not involve any question concerning this interest of the State. As noted earlier, Nader met the Ohio requirements in order to qualify for a place on the ballot and certainly cannot be considered "a frivolous candidate."

The constitutional questions arise in the present case from the manner in which the eligible candidates' names appear on the ballot.

The State would not need to change its requirements for obtaining access to the ballot in order to meet its constitutional obligations to respect the First and Fourteenth Amendment rights of voters and qualified candidates to have identifying "cues" alongside the candidates' names on the ballots. Ohio Revised Code § 3505.03 could, for example, read as follows:[19]

> Under the name of each candidate nominated by a political party at a primary election, each candidate certified by a party committee to fill a vacancy under § 3513.31, *and each candidate who has been nominated at a political organization's convention*, shall be printed, in less prominent type face than that in which the candidate's name is printed, the name of the political party *or political organization* by which the candidate was nominated or certified.
>
> Except as provided in this section, no words, designations, or emblems descriptive of a candidate or his political affiliation, or indicative of the method by which the candidate was nominated or certified, shall be printed under or after a candidate's name which is printed on the ballot.

The State could well define "political organization" as a political party that does not meet the definition of a

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[19] The underlined portions of the statute are changes that could be made, if the Ohio legislature desired to do so.

political party in Ohio Revised Code § 3517.01 but nonetheless is an organized political party that has nominated at its convention, with the consent and approval of the person so nominated, a candidate for a political office who meets the requirements of obtaining access to the ballot.

The Court greatly respects the right of Ohio's General Assembly to enact appropriate legislation concerning the manner in which persons may gain access to the ballot in Ohio, as well as its right to enact appropriate legislation concerning the format of ballots used when candidates meet the requirements for appearing on the ballots. In making the above illustration, the Court does not mean to suggest that this illustration is the only, or indeed even the most appropriate, method for meeting the constitutional deficiencies in Ohio Revised Code § 3505.03. It is set forth simply to illustrate the fact that there is a marked difference in the State's constitutional ability to set requirements for ballot access and its ability, once that access has been achieved, to discriminate among the candidates in the manner in which their names are shown on that ballot. There are legitimate state interests involved in the former process, sufficiently strong enough to tilt in the State's favor under the balancing requirements of *Anderson*. There are no legitimate state interests involved in the latter process sufficiently strong enough under the balancing requirements of *Anderson* to overcome the First and Fourteenth Amendment rights of voters and candidates.

The State also contends that "Ohio indisputably has the right to prevent voter confusion." (Def.'s Brief at 17). This is obviously true, and the State advances several arguments in this regard.

First, it contends that by placing the Green Party label next to Nader's name on the ballot, electors "would believe that much like the Republican, Democrat, Libertarian, and Natural Law Parties, the Green Party has satisfied the statutory threshold for being recognized as a party in Ohio." *Id.* This contention assumes that voters are familiar with the intricacies of Ohio's statutes dealing with "major," "intermediate," and "minor" political parties and the numerical support required under the statutes for political parties to qualify for a particular status in this hierarchy. The Court questions the validity of this assumption, but does agree that voters would indeed identify Nader as the nominee of a political party – much like the Republican, Democrat, Libertarian, and Natural Law Parties. That is not only a valid assumption, but it is also extremely important, because such identification, instead of causing confusion, obviously presents a far more informative description of the candidate than the absence of any identification. The undisputed fact is that Nader is the nominee of the Association of State Green Parties, of which Plaintiff Ohio Green Party is a member. According to the Party's official statement, Plaintiff Green Party is an association of citizens with an alternative vision and philosophy from that of the two major candidates. (Stipulations ¶ 6). Without the identifying "cue," voters who do not ascribe to the views of the Green Party, oppose those policies, and hence would not vote for a candidate of that party, could well cast a vote for Nader because of some other reason, *e.g.*, a national reputation as a consumers' advocate. Conversely, voters who share the vision and philosophy of the Green Party, but are unaware that Nader is the candidate of that party, might well cast their votes for one of the other candidates having a party

identification and whose party's views come closest to, but are not the same as, theirs.

In its brief to the Sixth Circuit in the *Schrader* case, the State argues that "other individuals, following a similar path as Schrader, could declare themselves true believers in the "American Nazi Party," the "Anti-Semite Party," or the "American Eagle Party" and demand that his or her party label be listed on the ballot as a necessary ballot cue, in spite of the fact that the candidate's political party had failed to qualify under Ohio Revised Code § 3517.01(A). *Schrader v. Blackwell*, Case No. 00-3044, Final Brief of Appellant at 18). This is true, but it must be remembered that the candidate had enough support for his or her candidacy to qualify under Ohio law as a legitimate candidate for the office and to have his or her name on the ballot. Once becoming eligible as a candidate, it certainly is not confusing to have the candidate identified as the nominee, for example, of the "American Nazi Party." Indeed, just the opposite is true. Because the candidate *is* so identified, voters are informed of his or her representation of a party whose beliefs are antithetical to the beliefs of virtually every citizen in this nation. By prohibiting the qualified candidate from being identified on the ballot as the nominee of the "American Nazi Party," Ohio Revised Code § 3505.03 deprives the voters of that information. A candidate who supports the "American Nazi Party" and has a name similar to that of a highly respected and popular politician could receive votes from persons who would never consider voting for that candidate if the ballot informed the voter that he was the candidate of the "American Nazi Party."

Second, the State contends that electors would believe that Nader is a member of the Green Party, whereas he is

not. The undisputed fact, however, is that Nader was nominated as the Green Party's candidate for President and he and his running mate "have agreed to support the Party's platform, candidates, and help build its base of support." (Stipulations ¶ 8). In short, Nader is the chosen representative of the Green Party, is the bona fide candidate of that party and, for reasons stated earlier, this information, communicated to the voters by the ballot "cue" is a significant factor in the exercise of "the right of qualified voters, regardless of party affiliation, to cast their votes effectively." *Rosen*, 970 F.2d at 177.

Third, the State points out that the Green Party never attempted to comply with the provisions of Ohio Revised Code § 3517.01(A). This is not disputed, but the Court does not understand how that fact would contribute to voter confusion or deception unless it is assumed that (1) voters are familiar with the intricacies of Ohio's statutory scheme regarding "qualified" political parties, and (2) voters would not vote for the candidate of any political party that does not fall within Ohio's statutory definition of a political party. Such an assumption, in the Court's view, is a thin reed on which to rest an argument for prohibiting voters from knowing that Nader and his running mate are, in fact, the candidates of the Green Party for the offices of President and Vice-President.

Finally, the State contends that the nominating petitions circulated by supporters of the Green Party "misled" the signatories because the form prescribed by the Secretary of State had no place "to communicate this information" (that Nader is the nominee of the Green Party), but the circulators nevertheless inserted the words "Ballot line for these candidates is Green." It is difficult to understand how this effort to inform persons of Nader's

association with the Green Party before the persons signed his petition affects the issues involved in this case. If anything, it gave notice to persons being asked to sign the nominating petitions of Nader's affiliation with the Green Party, a fact that could well influence the person either to sign or not sign, in the same manner that identifying Nader as a candidate of the Green Party on the ballot could well influence the voter to either cast a vote for him or against him.

D. Laches

In his Amended Answer, which was filed on the day of the hearing, Defendant for the first time asserted the equitable defense of laches, claiming that Plaintiffs' delay in filing suit should bar their claims. This defense requires proof of (1) lack of diligence by the party against whom the defense is asserted, and (2) prejudice to the party asserting the defense. *Costello v. United States*, 365 U.S. 265, 282 (1961). Defendant claims that Plaintiffs should have followed up sooner on their letter dated August 10, 2000 in which they requested a ballot cue next to Nader and LaDuke's names indicating that the candidates were the nominees of the Green Party. Defendant also claims that Plaintiffs knew on September 6th or 7th that the Secretary of State did not intend to place the word "Green" next to Nader and LaDuke's names on the ballot, and yet waited until September 27th to file suit. Defendant further claims that Plaintiffs' lack of diligence prejudiced Defendant, who proceeded with preparations for the upcoming election, incurring expenses in doing so.

In support, Defendant cites the cases of *Kay v. Austin*, 621 F.2d 809 (6th Cir. 1980), and *Libertarian Party v.*

Davis, 601 F. Supp. 522 (E.D. Ky. 1985), in which plaintiffs' claims were held to be barred by the doctrine of laches. In *Kay*, the candidate waited two weeks after the Secretary of State determined who was eligible to be on the ballot before inquiring whether his name was on that list of candidates, and had then waited another eleven days before filing suit. During this time, the Secretary of State had proceeded with election preparations. 621 F.2d at 813. In *Davis*, Plaintiffs waited forty-eight days to file suit after being notified that the Secretary of State would not accept their nominating petitions.

Kay and *Davis* are distinguishable because, in both of those cases, only the plaintiffs could be blamed for the delay in filing suit. In this case, however, Defendant is at least partially to blame. On August 10, 2000 a letter was hand-delivered to the Secretary of State's office by the legal representatives of the Green Party of Ohio requesting that, when the Secretary of State certified the candidacy of Nader and LaDuke to the presidential ballot, "appropriate party identification wording be placed next to their names," specifically the word "Green" or the words "Green Party." The letter requested a response no later than August 17, 2000. The letter further stated that the request was based upon the authority of the *Rosen* and *Schrader* cases. (Ex. A to Stipulations).

The Secretary of State, however, never answered the letter or responded to the request, although he "intended to decline the request." (Stipulations ¶ 11). Almost one month later, on either September 6th or 7th, the Secretary of State's office received a telephone call from "someone in

the Nader campaign" who requested information regarding the status of the Nader petitions.[20] Patricia A. Wolfe, Elections Administrator at the Secretary of State's office, returned the call by leaving a message on an answering machine indicating that Nader and LaDuke had received a sufficient number of valid signatures to appear on the Ohio ballot but without the Green Party designation. (Wolfe Aff., Ex. 4A to Def.'s Brief). The ballot was certified on September 7th. The instant lawsuit was filed on September 27, 2000.

It seems clear that Plaintiffs' delay in filing suit on September 27, 2000 was caused in substantial part by the Defendant' s failure to promptly respond to their letter. "If the party which advances the defense of laches is responsible for the delay or contributes substantially to it he cannot take advantage of it." *Cleveland Newspaper Build, Local 1 v. Plain Dealer Publishing Co.*, 839 F.2d 1147, 1162 (Milburn, J., dissenting) (*quoting Potash Co. v. Int'l Minerals & Chem. Corp.*, 213 F.2d 153, 155 (10th Cir. 1954). *See also Gruca v. United States Steel Corp.*, 360 F. Supp. 38, 47 (E.D. Pa. 1973), *rev'd on other grounds*, 495 F.2d 1252 (3d Cir. 1974) (laches defense not available where defendant "was in some degree responsible for the lapse of time at issue"). Laches is an equitable doctrine and "he who comes into equity must come with clean hands."

Since Defendant now proffers that he intended all along to deny the requested cue, Defendant could have notified Plaintiffs as early as August 10th that no cue

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[20] The Secretary of State's office kept no record of that person's name or telephone number.

would appear on the ballot. As the letter of August 10, 2000 clearly shows, the Green Party's representative was relying on decisions of the Sixth Circuit and of this Court in making the requested ballot designation. While it is true that this Court in the *Schrader* case had stayed the execution of its judgment while the appeal was pending, the existence of that stay and a hope that the Court of Appeals may some day reverse that decision are no excuses for the Secretary of State's failure to respond to the letter.

The issues involved in this case are not only critically important constitutional issues, but they also require research and an understanding of the intricacies of Ohio's election laws before an attorney could file a complaint and comply with the mandate of Fed. R. Civ. P. 11 that "there is good ground to support" the filing of a complaint. Under all the circumstances of this case, the Court does not believe that a finding of a lack of diligence by the Plaintiffs is warranted. Furthermore, whatever prejudice the Secretary of State claims as a result of proceeding with the preparations for the upcoming election may be laid, at least partially, at the doorstep of his office. If the Secretary of State had promptly responded to the letter of August 10, 2000, considering the three weeks taken for research and preparation of the complaint, the lawsuit would have been filed on or about August 31, 2000, even prior to the Secretary of State's certification of the ballot. The claimed prejudice resulting from printing of the ballots – which could not commence until the ballot was certified – could have been avoided or certainly mitigated.

Laches, as noted, is an equitable doctrine, and its application must, of necessity, depend upon the unique facts and circumstances of each case. Under the facts and

circumstances of this case, there is no merit to Defendant's belated assertion of this defense.

III. Declaratory Judgment and Injunctive Relief

A. Declaratory Judgment

Under the Declaratory Judgment Act, in the case of an actual controversy within its jurisdiction, a court may declare the rights of an interested party seeking such a declaration, even if no further relief is sought. That declaration has the force and effect of a final judgment or decree. 28 U.S.C. § 2201(a).

Several factors must be considered in determining whether a case is suitable for declaratory judgment: (1) whether the judgment would settle the controversy; (2) whether the declaratory action would serve a useful purpose in clarifying the legal relations at issue; (3) whether the declaratory remedy is being used merely for the purpose of "procedural fencing" or "to provide an arena for a race for *res judicata*;" (4) whether the use of a declaratory action would increase friction between our federal and state courts and improperly encroach on state jurisdiction; and (5) whether there is an alternative remedy that is better or more effective. *Grand Trunk Western RR. v. Consolidated Rail Corp.*, 746 F.2d 323, 326 (6th Cir. 1984). The two principal criteria are whether a declaratory judgment "will serve a useful purpose in clarifying and settling the legal relations in issue" and whether it will "terminate and afford relief from the uncertainty, insecurity, and controversy giving rise to the proceeding." *Id. (citing* E. Borchard, Declaratory Judgments 299 (2d ed. 1941)). All of these factors weigh in favor of granting a declaratory judgment in this case.

The Court finds that Plaintiffs are entitled to a declaratory judgment. Ohio Revised Code § 3505.03, as applied to candidates of parties that do not qualify as "political parties" under Ohio Revised Code § 3517.01 but who have met the requirements of Ohio law to have their names appear on the ballot as a candidate for public office, violates the Plaintiffs' First Amendment rights of freedom of speech and freedom of association and the Fourteenth Amendment right to equal protection of the laws. A candidate who has submitted enough valid signatures to gain access to the ballot and is the nominee of a political party is entitled to a voting "cue" indicating that he is the nominee of that political party in the same manner prescribed by § 3505.03 for candidates who gain access to the ballot through a primary election are entitled to a voting "cue" that they are the nominees of a political party.

B. Injunctive Relief

Under the Declaratory Judgment Act, once a declaratory judgment is rendered, further necessary or proper relief based on that judgment may be granted. 28 U.S.C. § 2202. In this case, Plaintiffs seek a preliminary and permanent injunction requiring Defendant to place the designation "Green" next to Nader and LaDuke's names on the ballots for the November 7, 2000 election. Permanent injunctive relief normally may not be granted until after a trial on the merits. However, since the Court advanced the trial on the merits and consolidated it with the hearing on Plaintiffs' motion for a preliminary injunction pursuant to Fed. R. Civ. P. 65(a)(2), the Court may now grant permanent injunctive relief based on the declaratory judgment. *See University of Texas v. Camenisch*, 451 U.S. 390, 395 (1981).

The Sixth Circuit has held that "[w]here the plaintiff establishes a constitutional violation after a trial on the merits, the plaintiff will be entitled to permanent injunctive relief upon showing 1) a continuing irreparable injury if the court fails to issue the injunction, and (2) the lack of an adequate remedy at law." *Kallstrom v. City of Columbus*, 136 F.3d 1055, 1067 (6th Cir. 1998) (*citing Dayton Christian Sch., Inc. v. Ohio Civil Rights Comm'n*, 766 F.2d 932, 961 (6th Cir. 1985)). If the Court finds that these requirement have been met, the Court must then "weigh the equities between the parties involved to determine how the respective interests of the parties will be affected by the granting or denying of the injunction." *Dayton Christian Schools v. Ohio Civil Rights Comm'n*, 578 F. Supp. 1004, 1017 (S.D. Ohio 1984), *rev'd on other grounds*, 766 F.2d 932 (6th Cir. 1985), *rev'd and remanded on other grounds*, 477 U.S. 619 (1986).

Having already determined that Plaintiffs have prevailed on the merits of their claim, the Court will examine the other requirements.

1. Irreparable Injury

The first factor to be considered is whether the movant would suffer irreparable injury if the injunctive relief requested is not granted. In *Elrod v. Burns*, 427 U.S. 347, 373 (1976), the Supreme Court held that "loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." Likewise, in *Newsom v. Norris*, 888 F.2d 371 (6th Cir. 1989), the Sixth Circuit held that "even minimal infringement upon First Amendment values constitutes irreparable injury sufficient to justify injunctive relief . . . One reason for

such stringent protection of First Amendment rights certainly is the intangible nature or the benefits flowing from the exercise of those rights; and the fear that, if these rights are not jealously safeguarded, persons will be deterred, even if imperceptibly, from exercising those rights in the future . . . " *Id.* at 378.

2. Adequate Remedy at Law

It is clear that only equitable relief in the form of a mandatory injunction is appropriate in a case of this nature.

3. Balancing the Equities

In weighing the equities between the parties involved to determine how the respective interests of the parties will be affected by the granting or denying of the injunction, the Court may consider factors such as the adequacy of another remedy, the impact in terms of benefits and hardships to each party and to third parties, the convenience and effectiveness of administration, and the public and social consequences. *Philadelphia Citizens in Action v. Schweiker*, 527 F. Supp. 182, 193 (E.D. Pa. 1981).

It is obvious that if injunctive relief in some form is not granted, the constitutional rights of the Plaintiffs which the Court seeks to protect by this opinion will be lost, insofar as the November 7, 2000 election is concerned. Weighed against the loss of these rights is the need for the designation "Green" to appear on the ballots beneath the names of the candidates of the Green Party. It has not been made clear to the Court exactly what has been done, what remains to be done, and what yet can be done in order to accomplish this objective.

According to the affidavit of Robert Keeler, President of Dayton Legal Blank, Inc., the company that currently prints the ballots for at least sixty of the eighty-eight counties in Ohio, the State has three primary systems of voting – punch card, optical scanning, and automatic voting machines ("AVM's"). Keeler Aff., Ex. 6 to Def.'s Brief. All of the ballots for the sixty counties for which the company prints ballots were to be printed by October 10, 2000, but the company could make changes on those ballots if directed to do so by Friday, October 13, 2000. *Id.*

Six Ohio counties for which Dayton Legal Blank, Inc. prints ballots use optical scanning machines to conduct voting, and these machines require special programming, special copyrighted paper, and the ballots are unique according to precinct. Two Ohio counties use AVM's that would be affected by a change order which would "require, most likely, stickering over the ballot." *Id.* Mr. Keeler estimates that "the cost of reprinting the entire state ballot for all eighty-eight counties would be in excess of $400,000, plus in-state and out-of-state priority shipping and handling charges" and exclusive of "the man hours that would be expended by local board of elections employees or employees of the Ohio Secretary of State." *Id.* The monetary cost of remedying a violation of constitutional rights clearly does not outweigh the importance of those rights, especially when it appears that those remedial costs could have been reduced, if not eliminated, had the Secretary of State promptly replied to Plaintiffs' letter of August 10, 2000.

Plaintiffs are entitled to injunctive relief, and the only remaining question is the most appropriate scope and form of that relief, taking into consideration the practical difficulties which may be encountered based upon the

limited information that has been given to the Court. At the hearing held on October 10, 2000, the Court inquired of counsel for the Plaintiffs as follows:

THE COURT: Am I stating your position correctly, Mr. Lodge, if I say that plaintiffs, should they prevail – and I don't mean to infer that I have made any decision to that effect – that if plaintiffs should prevail, that they should receive injunctive relief requiring the placement of the word "Green" alongside the Nader/LaDuke names on the ballot, to the extent that that is feasible under the circumstances?

MR. LODGE: Absolutely.

THE COURT: Is that correct?

MR. LODGE: Yes.

Although counsel also later said that perhaps he could provide authority for some additional "notice-type of posting at the polling places," (Transcript of Hearing at 70), none was provided, and the Court, after discussions with counsel for the parties, believes that an injunction of the type referred to by the Court, under the circumstances of this case, is the most appropriate relief that can be granted.

C. Injunction

For the reasons stated in this opinion, Defendant Secretary of State is hereby permanently enjoined from the enforcement of Ohio Revised Code § 3505.03, insofar as it prohibits the Defendant from placing the word "Green" below the names of Ralph Nader and Winona LaDuke in the same manner that the words "Democrat,"

"Republican," "Libertarian," and "Natural Law" appear below the names of the respective candidates of those political parties on the ballot for the offices of President and Vice-President of the United States.

The Secretary of State of Ohio is further ordered to immediately take action and to use his best efforts to assure, to the extent that it can be accomplished prior to the election on November 7, 2000, that all ballots for the election to be held on November 7, 2000 comply with this decision by having the word "Green" placed below the names of Ralph Nader and Winona LaDuke in the same manner that the words "Democrat," "Republican," "Libertarian," and "Natural Law" appear below the names of the respective candidates of those political parties on the ballot for the offices of President and Vice-President of the United States.

IV. Conclusion

This Court has had no desire to inject itself into election laws that are rightfully entrusted to state legislatures. As the Sixth Circuit observed in *Rosen*, a State has discretion in prescribing the particular makeup of the ballot for its various elections. Our Court of Appeals also pointed out, however, that "this discretion must be exercised in subordination to relevant constitutional guarantees." *Rosen*, 970 F.2d at 175.

Ohio's statute, Ohio Revised Code § 3505.03, as applied in this case, violates the rights of the Plaintiffs under the First and Fourteenth Amendments, and its enforcement must be enjoined. The Court is fully aware that its conclusion in the present case creates the need for prompt remedial action within a relatively short period of

time and involves the expenditure of money by the State of Ohio. The Court, however, after careful consideration of the issues presented in this case, believes that it was required to reach that conclusion for the reasons set forth in this opinion and to order appropriate remedial action. As another judge in another ballot configuration case has said:

> There is no purer duty of a federal judge than to hear the petitions of the citizenry, in open court, and to safeguard those constitutional principles which ensure dynamic political debate and, above all, a fair political process.

Devine v. Rhode Island, 827 F. Supp. 852, 865 (D.R.I. 1993).

John D. Holschuh, Judge
United States District Court

00-4274

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

RALPH NADER, ET AL., Plaintiffs-Appellees, v. J. KENNETH BLACKWELL, OHIO SECRETARY OF STATE, Defendant-Appellant.	)	ORDER (Filed March 28, 2002)

BEFORE: SUHRHEINRICH, SILER, and BATCHELDER, Circuit Judges.

The Court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this court, and no judge of this court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied.

ENTERED BY ORDER OF THE COURT

/s/ Leonard Green
Leonard Green, Clerk